BRIEF FOR THE PLAINTIFF IN ERROR

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IN THE

Supreme Court of the United States

NUMBER 423, 23

OCTOBER TERM, 1920.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, ET AL., *Plaintiffs in Error,*

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

(27,342)

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PRELIMINARY STATEMENT.

This is a Writ of Error to the Supreme Court of Iowa to review a judgment which affirmed a judgment of the District Court of Pocahontas County, Iowa, rendered against the Plaintiffs in Error, dismissing their claim for the cancellation of certain drainage assessments, and denying injunctive relief against their collection.

The case involves the constitutional validity under the due process clause of the Fourteenth Amendment of certain provisions of the statutes of the State of Iowa, which, as construed by the Supreme Court of this State, do not require notice to the taxpayer or fix a time or place of hearing, and, as construed by the Court, grant to the taxing power the authority to enlarge a previously constructed drainage district and to assess the costs thereof and fix the same irrevocably on a basis of the original levy, without notice to the

taxpayer, and without giving him an opportunity to contest the validity or amount.

The Plaintiffs in Error, owners of various parcels of land, embraced within Drainage District Number 29 of Pocahontas County, Iowa, brought this proceeding in equity to enjoin the collection, and for the cancellation of assessments levied upon their lands for the alleged expense, or cost of cleaning, repairing and enlarging certain existing and established open drainage ditches within the District, of which assessments, it was undisputed or was admitted by the Defendants in Error, that the Plaintiffs in Error had no notice nor any opportunity to contest its validity or amount.

STATEMENT OF THE CASE.

The Issues.

It will be conducive to a better understanding of the facts that the issues be now referred to. Briefly stated, and omitting all averments which are not germane to the Federal questions here involved, the Bill of the Plaintiffs in Error (Plaintiffs below) alleged:

That, acting for and in behalf of the Drainage District, the Board of Supervisors, Defendant in Error, entered into a contract with the Defendant in Error, Hiatt, for the deepening, cleaning, reopening and repair of certain ditches within Drainage District Number 29. That Hiatt entered upon the work provided for in said contract and completed it, but not only deepened, cleaned, reopened and repaired the ditches, but in addition thereto, lengthened, enlarged, extended and widened the ditches. That, upon completion of the work done by Hiatt, the Board directed the County Auditor to assess the cost of the work done upon all the lands within the District in proportion to their assessment for the original construction of the ditches within the District. That no notice of any kind or character was ever given to the land owners within the District of any proposed action of the Board affecting their lands within the District, or of the fact that a contract was to be let for work to be done within the District, nor was any notice ever given to them that any assessment was to be made or had been made to pay the cost of the work done, nor were they ever given, at any stage of the proceeding, any opportunity to contest:

(1). The necessity or advisability of the work or any changes to be made in the existing ditches.

(2) To show what, if any, benefits, the Plaintiffs (Plaintiffs in Error) would derive from the changing, reopening, repairing and deepening of the existing ditches.

(3). To show that the original classification of the lands was an improper classification for the purposes of assessment, in that, it did not take into account what benefits, if any, would be derived by the new work, and that the original classification was an improper classification to be used as the basis of the new assessment in view of the changes to be made in the existing ditches within the District.

(4). To show that the work contemplated was of benefit to other taxpayers in the District, and was of no benefit to the Plaintiffs (Plaintiffs in Error).

That the Plaintiffs (Plaintiffs in Error) were never given an opportunity to be heard as to the validity of the assessment or the amount thereof, and that no notice of any kind or character was given the Plaintiffs (Plaintiffs in error) thereof, and that they had no knowledge of the assessment until it appeared on the assessment roll, and thereupon, was a lien, under the statutes, on their lands, and having passed to the roll was irrevocably fixed.

That by reason of the facts thus plead, the assessments were void because:

(1). The said levy, or attempted levy, was made without any notice, hearing, or opportunity for hearing, or any opportunity for the Plaintiffs (Plaintiffs in Error) to object to the same, or to the apportionment thereof, or to the classification of their lands, and the same constituted the taking of lands of the Plaintiffs (Plaintiffs in Error) and depriving the Plaintiffs of their property without due process of law, contrary to Article XIV, being the Fourteenth Amendment to the Constitution of the United States. (R. p. 15.)

(2). That the section of the Iowa statute, to wit Supplement, Section 1918a-21, in providing for or authorizing the assessment or levy of such taxes without notice, hearing or opportunity therefor to the land owners whose property is sought to be burdened with such assessment and levy, is in contravention of and in violation of the said Fourteenth Amendment to the Constitution of the United States, in that it deprives these Plaintiffs of their property without due process of law, and such statute, and the assessment or levy made thereunder, is therefore void and of no effect. (R. p. 15.)

(3). That said statute is void and in contravention of said constitutional provisions of the Constitution of the United States because it makes no provision for a hearing or opportunity to be heard by the interested parties, and those against whom and whose property, assessments and taxes are thereby authorized to be levied, upon the question of the propriety or necessity of the improvement, enlargement or repair, or upon the question of whether the benefits which will result therefrom will accrue to the property owners in

the same proportion as the original apportionment and assessment, or upon the question of whether any benefits will accrue to all of the property assessed for the original improvement. (R. p. 15.)

(4). That said pretended levy and assessment, being made without notice or information to the Plaintiffs, or property owners, and without any hearing or opportunity therefor, either in respect of the propriety or necessity of the improvement, or the apportionment of the tax, or the distribution of the burden thereof is void, because the Plaintiffs are sought to be deprived of property without due process of law, and the same violates the Fourteenth Amendment to the Constitution of the United States, and the Plaintiffs expressly claim the benefit and protection of said constitutional provision. (R. p. 16.)

(5). That said assessment and levy and the ordering of the enlargement, changes and additions to said improvement were made without any hearing or notice, or any opportunity for hearing, and the said assessment and levy are in contravention of the provisions of the Constitution of the United States forbidding the taking of private property without due process of law, and is in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, and the provisions of Section 1989a-21 of the Supplement of the Code of Iowa, and other provisions of the statute in reference to the levy of assessments and taxes for the payment of drainage improvements, in so far as they authorize the establishment or ordering of the improvement, and the making of such levy or assessment without any hearing or opportunity for hearing are void because in contravention of the said provisions of the United States. (R. p. 16.)

(6). That the said levy and assessment were not, and are not required for the payment of the original improvement in accordance with the classification and apportionment in the construction of said improvement as originally constructed. That the said moneys are sought to be raised by said levy and assessment, in large part, for new and enlarged ditches and improvements, for the purpose of benefiting, and the same will benefit only a portion of the property and property owners whose property was assessed for said original improvement, the said property and persons being other than the property of and the Plaintiffs. That the Plaintiffs were, because thereof, entitled to be heard in reference to the establishment and ordering of the improvement and the classification of their lands in ratio to the benefits and apportionment of said tax and before the same was spread, levied or assessed. That no notice of any hearing, or intention to make said levy or assessment or to spread said taxes, was ever given to the Plaintiffs and no opportunity to present to the said Board of Supervisors the claim of the Plaintiffs in

reference to a just and equitable apportionment of said levy and assessment. That the amount of the tax to be exacted against the Plaintiffs depended upon and should be proportioned in equitable ratio in reference to the benefits derived from the improvement for which said expenditures were made, or sought to be made.

And the Plaintiffs aver and state that upon any notice or hearing, they would be entitled to show and show that all benefits to be derived therefrom would accrue to the property and persons other than the Plaintiffs or their property. That the said pretended levy and assessment constitute the actual taking of the private property of the Plaintiffs, without notice and without any opportunity for hearing, and without any opportunity to show that the original classification and apportionment, though just and equitable as to the cost of the original cost of the improvement, is wholly unjust and inequitable to the Plaintiffs in so far as it involves the expenditures for which said levy and assessments were made and are now sought to be enforced. (R. pp. 16-17.)

The ultimate facts, as thus set forth and alleged, in the Bill of the Plaintiffs (Plaintiffs in Error), were undisputed in that the allegations of the ultimate facts were either admitted or not denied in the pleadings of the Defendants, or were undisputed in the evidence adduced upon the trial. The Defendants in Error, other than the Defendant in Error, Hiatt, admitted in their pleadings that the contract made with Hiatt was made so that the improvement could be enlarged, reopened, deepened, widened and repaired, in order to effect, as it is claimed, the best interest of the public, and that it was the duty of the Board of Supervisors to keep the improvement in repair, and for that purpose, it entered into said contract. That, if the Plaintiffs (Plaintiffs in Error) were to be given the relief prayed for by them that the cost of the work would, thereupon be thrust upon the owners of other lands in the District, and thereby, the Plaintiffs would receive a wicked, illegal and unconscionable advantage, and the Plaintiffs would, thereby, escape the burden of paying any part of said work. That the order and resolution for the fixing of the assessments and the apportionment thereof for the construction of the original improvement was made upon full notice to the Plaintiffs and upon full opportunity to be heard.

The Defendant, Hiatt, averred that he had not sufficient knowledge or information as to the allegations of the Plaintiff, and therefore, demanded strict proof thereof, and offered "to do equity."

STATUTE INVOLVED.

The statute in issue in this case is Section 1989-a21 of the Code of Iowa, and reads as follows, (omitting inapplicable portions):

> Control—repairs—cost.
> "Whenever any levee or drainage district shall have been established and the improvement constructed as in this chapter provided, the same shall at all times be under the control and supervision of the board of supervisors, and it shall be the duty of the board to keep the same in repair, and for that purpose they may cause the same to be enlarged, reopened, deepened, widened, straightened or lengthened for a better outlet, and they may change or enlarge the same or cause all or any part thereof to be converted into a closed drain when considered for the best interests of the public rights affected thereby. The cost of such repairs or change shall be paid by the board from the drainage fund of said levee or drainage district, or by assessing and levying the cost of such change or repair upon the lands in the same proportion that the original expenses and cost of construction were levied and assessed, except where additional right of way is required or additional lands affected thereby in either of which cases the board shall proceed as hereinbefore provided."

THE IOWA DRAINAGE STATUTE.

In order that this Court may have before it the material provisions of the Iowa Drainage statute as the same is referred to in the opinion of the Supreme Court of Iowa, and in this argument, we set it out below:

> "Section 1989-a1. BOARD OF SUPERVISORS TO ESTABLISH DRAINAGE DISTRICT. The Board of Supervisors of any county shall have jurisdiction, power and authority * * * to establish a drainage district or districts * * * and cause to be constructed as hereinafter provided, any levee, ditch, drain * * * in such County. * * *"
>
> "Section 1989-a2. PROCEEDINGS—Bond—SURVEY. Whenever a petition signed by one or more of the landowners whose lands will be affected by, or assessed for the expenses of, the proposed improvement, shall be filed in the office of the County Auditor setting forth that * * * such lands, subject to overflow or too wet for cultivation * * * the Board shall at its first session thereafter

* * appoint a disinterested and competent engineer, * * and place a copy of the petition in his hands, and shall proceed to examine the lands described in said tition, and any other land which would be benefited said improvement or necessary in the carrying out of id improvement, and survey, and locate such drain or ains, ditch or ditches, improvement or improvements may be practicable and feasible to carry out the purse of the petition. * * * He shall make return of his oceedings to the County Auditor which return shall t forth the starting point, the route, the terminus or rmini of said ditch or ditches, drain or drains, or other provements, together with plat and profile showing tches, drains or other improvements and course and ngth of the drain or drains through each tract of land, gether with the number of acres appropriated from id tract for the construction of said improvement and evation of all lakes, ponds and deep depressions in id district and boundary of the proposed district, so to include therein all lands that will be benefited by e proposed improvement and description of each tract land therein, names of owners thereof as shown by e transfer books in the Auditor's office, together with e probable cost, and such other facts and recomendations as he may deem material. * * *"

"Section 1989-a3. NOTICE OF HEARING—APROVAL OF PLAN. Upon the filing of the return of the gineer, if the same recommends the establishment of levee or drainage district, the Board of Supervisors all then examine the return of the Engineer, and if the an seems to be expedient and meets with the approval the Board of Supervisors, they shall direct the Auditor cause a notice to be given as hereinafter provided; * * * nen the plan, if any, shall have been finally adopted the Board of Supervisors, they shall order the Auditor mediately thereafter, to cause notice to be given to the wners of each tract of land or lot within the proposed vee or drainage district, as shown by the transfer books the Auditor's office * * * of the pendency and prayer said petition, favorable report thereon by the engineer, d that such report may be amended before final acn, the day set for hearing of said petition and report fore the Board of Supervisors, and that all claims for mages must be filed in the Auditor's office not less than e days before the day set for hearing upon petition, nich notice shall be served, except as otherwise hereafter provided, by publication thereof once each week r two consecutive weeks in some newspaper of general rculation published in the county." * * *

"Section 1989-a5. LOCATION—APPRAISERS. The Board of Supervisors at the session set for hearing on said petition, * * * shall thereupon proceed to hear and determine the sufficiency of the petition in form and substance; * * * if they shall find such improvement conducive to the public health, convenience or welfare or to the public benefit or utility * * * they may, if deemed advisable, locate and establish same in accordance with the recommendations of the engineer, or they may refuse to establish the same as they may deem best." * * *

"Section 1989-a6. ASSESSMENT OF DAMAGES—APPEAL. The appraisers appointed to assess damages shall proceed to view the premises and determine and fix the amount of damages to which each claimant is entitled, and shall place a valuation upon all acreage taken for right of way as shown by plat of engineer, and shall, at least five days before the day fixed by the Board to hear and determine same, file with the County Auditor reports in writing showing the amount of damages sustained by each claimant. * * * When the time for final action shall have arrived and after the filing of the report of appraisers, said board shall consider the amount of damages awarded in their final determination in regard to establishing such levee or drainage district, and if in their opinion the cost of construction and the amount of damages awarded is not excessive and a greater burden than should be properly borne by the land benefited by the improvement, they shall locate and establish same, and they shall thereupon appoint said engineer, as a commissioner, who shall make a permanent survey of said ditch as so located, showing the levels and elevations of each forty acre tract of land, and shall file a report of the same with the County Auditor, together with a plat and profile thereof, and shall thereupon proceed to determine the amount of damage sustained by each claimant, and may hear evidence in respect thereto, and may increase or diminish the amount awarded in respect thereto and any party aggrieved may appeal from the finding of the Board in establishing or refusing to establish the improvement district or from its finding in the allowance of damages to the district by filing notice with the County Auditor at any time within twenty days after such finding and at the same time filing a bond with the County Auditor approved by him, and conditioned to pay all costs and expenses of the appeal, unless the finding of the District Court shall be more favorable to the appellant or appellants, than the finding of the Board. * * * If the appeal is from the amount of damages allowed, the amount ascertained in the District Court shall be entered of record but no judgment shall be rendered there-

for. The amount thus ascertained shall be certified by the Clerk of said Court to the Board of Supervisors, who shall thereafter proceed as if such amount had been by it allowed the claimant as damages. * * *

"Section 1989-a7. DAMAGES—BY WHOM PAID—DIVISION INTO DISTRICTS—ENGINEER. * * * The Board shall divide said improvement into suitable sections, numbering same consecutively from the source or beginning of the improvement downwards towards its outlet, and prescribe the time within which the improvement shall be completed, and appoint a competent engineer to have charge of the work and construction thereof." * * *

"Section 1989-a8. LETTING OF WORK—NOTICE—BIDS. The board shall cause notice to be given by publication, once each week, for two consecutive weeks in some newspaper published in the County wherein such improvement is located * * * of the time and place of letting the work of construction of said improvement, and in such notice they shall specify the approximate amount of work to be done in each section; * * * and when the estimated cost of said improvement exceeds fifteen thousand dollars the Board shall make additional publication for two consecutive weeks in some contracting journal of general circulation, of such notice as they may prescribe, and they shall award contract or contracts for each section of work to the lowest responsible bidder or bidders therefor, bids to be submitted, received and acted upon separately as to the main drain and each of the laterals, exercising their own discretion as to letting such work as to the main drain as a whole, or as to each lateral as a whole, or by sections as to both main drain and laterals, and reserving the right to reject any and all bids and readvertise the letting of the work." * * *

"Section 1989-a 9. MONTHLY ESTIMATES—PAYMENT. The engineer in charge of the construction shall furnish the contractor monthly estimates of the amount of work done on each section, and upon filing the same with the Auditor, he shall draw a warrant in favor of such contractor, or deliver to him improvement certificates, as the case may be, for eighty per centum of the value of the work done according to the estimate, and when said improvement is completed * * * the Auditor shall draw a warrant in favor of said contractor upon the levee or drainage fund, * * * for the balance due."

"Section 1989-a 12. ASSESSMENT OF COST AND DAMAGES—APPORTIONMENT. When the levee or drainage district or other improvement herein provided for shall have been located and established as provided for in this Act, or when it shall be necessary to cause

the same to be repaired, enlarged, reopened or cleared from any obstructions therein, unless such repairs, reopening or clearing of obstructions can be paid for as hereinafter provided, the Board shall appoint three commissioners, one of whom shall be a competent civil engineer and two of whom shall be resident freeholders of the State, not living within the levee or drainage district and not interested therein or in a like question, nor related to any party whose land is affected thereby; and they shall within twenty days after such appointment, begin to personally inspect and classify all lands benefited by the location and construction of such levee or drainage district or the repairing or reopening of same, in tracts of forty acres or less according to the legal or recognized subdivisions in a gradual scale of benefits to be numbered according to the benefit to be received by the proposed improvement; and they shall make an equitable apportionment of the cost, expenses, costs of construction, fees and damages asessed for the construction of any such improvement, or the repairing or reopening of same, and make report thereof in writing to the Board of Supervisors. In making the said estimate the lands receiving the greatest benefit shall be marked on a scale of one hundred and those benefited in a less degree shall be marked with such percentage of one hundred as the benefit received bears in proportion thereto. This classification when finally established shall remain as a basis for all future assessments connected with the object of said levee or drainage district, unless the Board, for good cause, shall authorize a revision thereof. In the report of the appraisers so appointed they shall specify each tract of land by proper description and the ownership thereof as same appears on the transfer books in the Auditor's office, and the Auditor shall cause notice to be served upon each person whose name appears as owner * * * in the time and manner provided for the establishment of a levee or drainage district, which notice shall state the amount of special assessments apportioned to such owner upon each tract or lot, the day set for hearing the same before the Board of Supervisors and that all objections thereto must be made in writing and filed with the County Auditor on or before noon of the day set for such hearing. When the day set for hearing shall have arrived, the Board of Supervisors shall proceed to hear and determine all objections made and filed to said report, and may increase, diminish or annul or affirm the apportionment made in said report or in any part thereof as may appear to the Board to be just and equitable; but in no case shall it be competent to show that the lands

assessed would not be benefited by the improvement, and when such hearing shall have been had, the Board shall levy such apportionment so fixed by it, upon the lands within such levee or drainage district; * * * and in case the Board of Supervisors shall increase said apportionment, service of notice thereof shall be made upon the owner of such tract or lot of land as shown by the transfer books in the Auditor's office in the same manner in which original notices are required to be served. * * *"

"Section 1989-a 13. LEVY AND COLLECTION OF TAX-WARRANTS. In estimating the benefits as to the lands not traversed by said improvement, they shall not consider what benefits such lands will receive after some other improvements shall have been constructed, but only the benefits which will be received by reason of the construction of the improvement in question as it affords an outlet for the drainage of such lands, or brings an outlet nearer to said lands or relieves same from overflow. Said tax shall be levied upon the lands of the owner so benefited in the ratio aforesaid." * * *

"Section 1989-a 14. APPEAL. An appeal may be taken to the District Court from the order of the Board fixing the assessment of benefits upon the lands in the same manner and time as herein provided for appeals from the assessment of damages, and such appeal may be taken from the order of the Board of Supervisors increasing the apportionment within twenty days after the completed service of the notice of such increased apportionment in the same manner as herein provided for appeals in assessment for damages, whether objection was made to the report of the commissioners or not." * * *

"Section 1989-a 26. SPECIAL ASSESSMENT—HOW PAID. Special assessment for benefits made by the Commissioners appointed for that purpose, as corrected and approved by the Board of Supervisors shall be levied at one time by the Board against the property so benefited, and when levied and certified shall be payable at the office of the County Treasurer," * * * shall mature at one time and be due and payable with interest from the date of such assessment, and shall be collected at the next succeeding March semi-annual payment of ordinary taxes."

STATEMENT OF FACTS.

In the year, 1907, pursuant to the statutes of the State of Iowa, a drainage district, being the 29th, organized within Pocahontas County, Iowa, was duly established and designated as Drainage District Number 29 by the Board of Super-

visors of that County. (R. p. 2.) The district was thereupon improved by the construction of a drainage system composed of a certain main open ditch and laterals or branches, leading thereto, known as Branch "A" and Branch "B". (R. pp. 2-29-31-61.) The system of drains was completed in 1909. In the year 1910, the engineer in charge of the district reported to the Board of Supervisors who, under the statutes, is the governing body of all drainage districts within the county that the open ditches within the district had become filled with silt or sediment to an extent, and recommending that the channels be cleaned of that obstruction. (R. p. 40.) He estimated the silt and sediment so deposited in the channel at 5,500 cubic yards. (R. p. 40.) No action was taken by the Board of Supervisors on this report of the engineer, Warrington. (R. p....) In March, 1911, a further report was filed by the engineer, again recommending that the channels be cleaned of the sediment which had been deposited therein. (R. p. 68.) Acting upon this report and approving it, the Board entered into a contract with the Defendant in Error, Hiatt. (R. p. 47.) This contract had, among other provisions, the following:

> "Party of the second part hereby agrees to *deepen, clean, reopen and repair* said drainage district number 29 from Station Zero to Station 27 in the manner and to the proportionate depth and width as specified in the report of W. B. Warrington, filed March 6, 1911, and from Station 37 to Station 87, from Station 87 to Station 170, and from Station 170 to Station 250, the above approximating about 35,186 cubic yards herein called the lower end of said drainage district; also in addition to the above mentioned work in the lower end of said district, second party agrees to clean, reopen and repair Branch "A" of said district from Station Zero to Station 23 as specified in the engineer's report, approximating about 936 cubic yards in said Branch "A", the same to be done as part of the lower end of said district, and to clean, reopen, deepen and repair said drainage improvement from Station 402 to Station 500 as specified in said engineer's report and approximating about 7317 cubic yards, and herein called the upper end of said district, agreeing to clean, reopen and deepen said improvement according as the same is specified by said engineer's report * * * and agreeing to be governed in the performance of his part of said contract by the provisions of the Acts of the 30th General Assembly, Chapter 68, and all acts amendatory thereto relative to the construction of drainage improvement. * * * Party of the second part agrees to reopen, repair and clean said improvement under the supervision of the engineer in charge."

The letting of the contract was not advertised and was not offered for bids. (R. pp. 40 and 73-74.) The Defendant in Error, Hiatt, proceeded under the contract to perform the work, and upon its completion, the Board ordered the costs thereof to be assessed by the County Auditor and spread upon the lands within said district in proportion to their assessment for the original construction of the ditches within the District. (R. p. 40.)

No notice of any kind or character was ever given to any of the land owners within the District of any proposed action, affecting their lands, or of the fact that a contract was to be let for work to be done in the District, nor was any notice given to them that any assessment was to be made or had been made to pay the costs of the work done, nor were they given an opportunity to contest its validity or amount. The first knowledge that the Plaintiffs in Error, land owners, had as to any liability which was to be imposed upon them or upon their lands within the District, was gained when they went to pay their ordinary land taxes and found on the assessment rolls the special assessment against their lands. (R. p. 40.) The statutes of the State of Iowa make no provisions for an appeal or hearing as to special assessments after they have been entered on the assessment roll.

The contract called for a *deepening, cleaning, reopening* and *repairing* of the ditches existing in the drainage district. (R. p. 69.) The Bill of the Plaintiffs in Error likewise averred this fact, and further charged that the work actually done was not only the *deepening, cleaning, reopening* and *repairing*, but in addition thereto, the lengthening, enlarging, widening and extension of the ditches. (R. pp. 5 and 10.) These allegations were admitted by the Defendants in Error other than Hiatt, who alleged that he had not sufficient knowledge to determine the correctness of the allegations as charged by the Plaintiffs in Error, and demanded strict proof thereof, and "offered to do equity." (R. pp. 19 and 21.) The undisputed evidence is that the ditches were deepened, widened, lengthened, repaired and extended. The Defendant in Error, Hiatt, who had the contract for the work, admits in his testimony that he changed the slope of the ditches and deepened, widened and extended them and does not challenge, in his testimony, the other facts set out above. As illustrative of the amount and character of the work done, Hiatt admitted in his testimony that he was seeking compensation and had received drainage warrants, payable out of funds to be raised out of the assessment, for excavating 3,399 cubic yards on Branch "A", (R. pp. 64-65), while the contract called for an excavation of 936 cubic yards therein, which was almost equivalent to about four times the amount stated in the contract and five times the cubic yardage which would

necessarily have been excavated to have brought the ditch to the same dimensions as it was originally constructed. (R. p. 68.)

SPECIFICATIONS OF ERROR.

1. Section 1989-a-21, of the Code of Iowa in so far as it attempts to clothe the Board of Supervisors with ex parte power and authority to enlarge, by widening, deepening and lengthening a ditch theretofore constructed, is unconstitutional and void by reason of its failure to provide some kind of notice to those who are required, by statute, to defray the expense of the improvement, or afford an opportunity, at some state of the proceedings, to be heard upon all questions necessary to be determined in order to justify the proposed work, and the Supreme Court of Iowa, in failing to so hold and adjudge, committed manifest error.

2. The Supreme Court of Iowa, in holding and adjudging that no notice was requisite in proceedings had under section 1989-a-21 of the Code of Iowa, erred in holding and adjudging that said section was not unconstitutional and void as depriving those against whom assessments are made of their property without due process of law.

3. The statute, Section 1989-a-21 of the Code of Iowa, is not limited to mere ordinary repairs of an existing ditch. It not only authorizes repairs, but grants to a Board of Supervisors the further power to enlarge the ditch by widening its bank or deepening its channel, and, respecting this additional power, it contains no limitation respecting the extent to which the board may go. The Supreme Court of Iowa, therefore, in holding that section 1989-a-11 of the Code was not to be read in connection with section 1989-a-21, so as to require notice under section 1989-a-21, erred in holding and adjudging that said section 1989-a-21 was not unconstitutional and void.

4. In as much as section 1989-a-21 of the Code as construed by the Supreme Court of Iowa, does not require notice, and authorizes and empowers a Board of Supervisors to enlarge a previously constructed ditch by widening its banks and deepening its channel and even extending the ditch beyond its original construction, it is unconstitutional and void, for the reason that it contains no provision for notice to interested parties or otherwise affords them an opportunity to be heard, and the Supreme Court of Iowa, in not so holding, committed manifest error.

5. Code Section 1989-a-21, as administered and construed by the Supreme Court of Iowa, directly violates

and infringes the provisions of the Constitution of the United States in that the Supreme Court of Iowa holds and adjudges that no notice need be given to interested landowners of a deepening, widening and lengthening of an existing drainage ditch, and that an assessment may be levied to defray the costs thereof without notice or an opportunity to be heard, and by reason thereof the Supreme Court of Iowa committed manifest error, in so adjudicating the claims of the plaintiffs.

6. The Board of Supervisors were without power to make a contract for the purpose of deepening, widening, lengthening, enlarging and repairing of a ditch which had already been constructed, and to assess the cost thereof against the land owners within the district, without giving notice, and the Supreme Court of Iowa, in holding and adjudging to the contrary, committed manifest error for the reason that the land owners were deprived of their property without due process of law, contrary to Articles 5 and 14 of the Constitution of the United States.

7. The work done under the contract in this case was not a mere cleaning and repairing, but was widening of the banks and a deepening of the channel of the existing drainage ditch and therefore of a character requiring notice to be given to the land owners affected, and no notice having been given, the land owners were deprived of their property without due process of law. And the Supreme Court of Iowa committed manifest error in holding that the land owners were not entitled to a hearing or *notice of the letting of the contract* and of the assessment made thereunder.

8. The levy of the assessment against the lands of the plaintiffs, to pay for the construction of the work provided for in the contract, was void, and the county treasurer, in attempting to sell the lands of the plaintiffs for delinquent taxes, was without authority so to do, and the Supreme Court of the State of Iowa, in adjudging to the contrary, committed manifest error to the prejudice and rights of the plaintiffs, under and by virtue of the Constitution of the United States.

9. The tax and asessment, as levied by the Board of Supervisors of Pocahontas County, Iowa, and spread upon the tax records, is void and should have been ordered cancelled, and the collection thereof enjoined for want of any notice, and for failure to afford the tax payer an opportunity for hearing upon the question of subjecting his property to such tax and assessment, the same being levied and asesssed for a substantially and materially altered, widened, deepened and enlarged drainage improvement, without due process of law, and

contrary to Articles Five and Fourteen of the Constitution of the United States. And the Supreme Court of Iowa, in so failing to hold and to reverse the action of the trial court, committed manifest error.

10. Section 1989-a-21, as administered and justified by the Supreme Court of the State of Iowa, is unconstitutional and void for the reason it affords to interested land owners no opportunity whatsoever to file claims for damages. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

11. Section 1989-a-21, as construed, administered and applied by the Supreme Court of Iowa, does not provide an opportunity to land owners affected, to file objections to assessments levied against their lands, and, by reason thereof contravenes the provisions of Articles Five and Fourteen of the Constitution of the United States. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

12. Section 1989-a-21, as construed, administered and applied by the Supreme Court of the State of Iowa, fails to provide for any right of appeal to the interested land owners, and, by reason thereof, violates Articles Five and Fourteen of the Constitution of the United States. And the Supreme Court of Iowa, in not so holding, committed manifest error.

13. The assessment for the original construction of Drainage District Number Twenty-nine (29) having been levied as a unit and spread over the district without reference to the benefit received, contrary to the Statutes of Iowa, and the same method and classification having been used in spreading the assessment for the work done under the contract complained of, there was, by reason thereof, a taking of property without reference to the benefits received and without due process of law, and contrary to the Constitution of the United States. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

14. The Board of Supervisors of Pocahontas County, Iowa, having levied an assessment to cover the cost of Construction under the Hiatt contract, and which assessment was for work of construction done outside of Pocahontas County, as well as within Pocahontas County, Iowa, the assessment was void for want of jurisdiction, and the Board of Supervisors, in levying the assessment to pay for work, some of which was work done outside of the territorial limits of the county, therefore violated the Constitution of the United States. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

FINAL ISSUES.

The foregoing specifications of error may be grouped for the purpose of simplifying the argument into five fundamental questions which therefore may be classed as main issues in the case. Accordingly, errors one, two, four, five, six, eight, eleven and twelve may be stated as follows:

Issue One.

The Supreme Court of Iowa erred in adjudging that Code Section 1989-a 21 was constitutional inasmuch as the statute as construed, and justified by that Court, grants to the Board of Supervisors of the county power and authority to enlarge by widening, deepening and lengthening a ditch already constructed, and to assess the costs thereof upon the lands of the landowners in the district, in the same proportion as the lands were assessed for the improvement when originally constructed, is without reference to the benefits or lack of benefits which may accrue by reason of the altered ditch and without notice to, or opportunity for hearing being given the landowners, nor providing for any appeal from their action in the premises.

Issue Two.

Error three may be stated as follows: Section 1989-a21 of the Code of Iowa is not limited to mere ordinary repairs of an existing ditch, but grants to a Board of Supervisors further power to enlarge the ditch by widening its bank or deepening its channel and respecting this additional power, it contains no limitations respecting the extent to which the Board may go, and, accordingly, the Supreme Court of Iowa in holding that this section was not to be read in connection with Section 1989-a11 so as to require notice erred in holding and judgment that Section 1989-a21 was not unconstitutional and void.

Issue Three.

Errors seven and nine may be stated as follows:

The work done under the contract was not a mere cleaning and repairing, but was the widening of the banks and deepening of the channel of the existing drainage ditch, and therefore of a character requiring notice to be given the landowner affected, and to afford them an opportunity for hearing upon the question of subjecting their property to the tax and assessment for a substantial and materially altered, widened, deepened and enlarged drainage improvement; and the Supreme Court of Iowa in adjudging and holding that

the landowners were not entitled to notice or an opportunity for hearing, committed error in that the landowners were denied due process of law, contrary to Article Fourteen of the Constitution of the United States.

Issue Four.

Error Thirteen may be stated as Issue Four.

The assessment in the instant case having been levied against the land in the district in the same ratio as the lands were assessed for the expense of the original construction, without reference to benefits received there was a taking of property without due process of law, contrary to the constitution of the United States.

Issue Five.

Error Fourteen may be stated as Issue Five.

The assessment in the case having been levied to cover the costs of construction of work done outside of the county as well as within the county, the assessment was void for the reason that the Board was without jurisdiction to assess for work done outside of the territory of limits of the county, and the assessment therefore was without due process of law.

Error Number Ten is not maintainable and is therefore waived.

QUESTION INVOLVED.

The principal question in the case, as set forth in the assignments of error, arises upon the contention of the plaintiffs in error that the method of assessment provided for the taxation of property in such cases as the present as laid down in the statutes of the State of Iowa, as construed by the Supreme Court of the State, does not afford the tax payer due process of law.

I.

BRIEF OF POINTS AND AUTHORITIES.

This Court has jurisdiction of the case. The validity of the Iowa Statute Sec. 1989-a-21, and of the authority exercised thereunder, was drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision of the state court was in favor of its validity.

Sec. 237 Judicial Code;

Philadelphia etc. Co. v. Gilbert, 245 U. S. 162, 62 L. Ed. 221, 38 Sup. Ct. Rep. 58;

Northern Pac. R. Co. v. Solum, 247 U. S. 477, 62 L. ed. 1221;
Ireland v. Woods, 246 U. S. 323, 62 L. ed. 745, 38 Sup. Ct. Rep. 319;
Stadelman v. Miner, 246 U. S. 544, 62 L. ed. 875, 38 Sup. Ct. Rep. 359;
Coon v. Kennedy, 248 U. S. 457, 63 L. ed. 358;
New Orleans and Northeastern Railroad Co. v. Scarlet, 249 U. S. 528, 63 L. ed. 752;
Dana vs. Dana, 250 U. S. 220, 63 L. ed. 947;
Kenney Administrator, etc. v. Supreme Lodge of the World, 64 L. ed. U. S. Advance Opinions 459.

II.

The essentials of due process are notice and hearing.
Londoner v. Denver, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708;
Central of Georgia R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47;
Turner v. Wade, decided Nov. 8, 1920, reported at page 23 L. ed. U. S. Adv. Op.

III.

If the legislature of a state, instead of fixing the tax or assessment itself, commits to a subordinate body the duty of determining whether, and in what amount, and upon whom the tax or assessment shall be levied, due process of law requires that at some stage of the proceedings, before the tax or assessment becomes irrevocably fixed, the tax payer must have the opportunity to be heard, of which he must have notice whether personal, by publication, or by some statute, fixing the time and place of the hearing.
Turner v. Wade, 65 L. ed. Advance Opinions 1920 23, 24;
Londoner v. Denver, 210 U. S. 373, 385, 52 L. ed. 1103, 1112, 28 Sup. Ct. Rep. 708;
Coe v. Armour Fertilizer Works, 237 U. S. 413, 425, 59 L. ed. 1027, 1032, 35 Sup. Ct. Rep. 625;
Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663;
Kentucky R. Tax cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57;
Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 537, 40 L. ed. 247, 251, 16 Sup. Ct. Rep. 83;
Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825;
Glidden v. Harrington, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574;

Hibben v. Smith, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88;
Security Trust & S. V. Co. v. Lexington, 203 U. S. 323 51 L. ed. 204, 27 Sup. Ct. Rep. 87;
Central R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47.

IV.

Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings for taxation. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal.

Londoner v. Denver, supra;
Pittsburg, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 426, 38 L. ed. 1031, 1036 14 Sup. Ct. Rep. 1114;
Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 171 et seq., 41 L. ed. 369, 393, 17 Sup. Ct. Rep. 56.

V.

Where a legislature attempts to confer upon a subordinate body, authority to enlarge or repair a previously constructed ditch, either by widening its banks, deepening its channel or lengthening it, and to assess the cost and expense to adjacent property without notice to or opportunity to be heard by interested property owners, the statute is unconstitutional as offending against the due process clause of the 14th Amendment.

In re Renville County, 109 Minn. 88, 122 N. W. 1120;
Harmon vs. Bolley, 120 N. E. 33 (Ind.).

1. The old ditches were materially deepened.

(a) The contract for the work called for a deepening of the old ditches (R. 68-69-70).
(b) The opinion of the Supreme Court conceded the fact, i. e.:
"the contractor * * * in certain places, increased the depth of the excavation below its original grade." (R. p. 89.)
"It is to be conceded that the channels were not only reopened, cleaned and emptied of silt and obstructions, but were in part, to some extent, *materially deepened.*" (Italics ours) (R. p. 89.)
(c) The pleadings of the defendants in error other than Hiatt, the contractor (who claimed he had insufficient knowledge to affirm or deny and therefore demanded

strict proof) admitted the charge that the contract with Hiatt was made so that the ditches could be deepened. (R. p. 18, l. 4.)

(d) The undisputed testimony in the case is that the ditches were deepened:

"We made it (the ditch) about three feet deeper throughout the length of Branch "A" (R. 23.)

"From the Milwaukee to the outlet (we) lowered it fully a foot and a half."

"It was two and a half feet deeper than as originally constructed." (R. 28.)

Hiatt, the contractor, admitted that he dug the ditches at least a foot below the original grade. (R. 48, 64, 65.)

2. The old ditches were materially widened.

(a) The undisputed testimony is that the ditches in the district were widened.

Hiatt, the contractor, testified they were widened "about two feet." (R. 64.)

Carter, the employee of Hiatt, at the time of the trial testified: "We made it fully five and one-half feet wider at the bottom with a slope." (R. 23.)

The engineer who cross-sectioned the ditch and whose evidence was undisputed testified Branch "A" had been widened on an average 4.8 feet or 25% greater than the original width. (R. 59.)

(b) The pleadings of the defendants in error other than Hiatt, the contractor, (who claimed he had insufficient knowledge to affirm or deny) admitted that the ditches were widened. (R. p. 18.)

(c) The opinion of the Supreme Court of Iowa concedes there was a widening of the ditches, i. e.:

"The contractor * * * in places sought to insure greater permanency of the banks of the ditch by increasing their slope and to that *extent increased the original width of the channel.* (Italics ours.)

3. The ditches were materially lengthened and extended.

(a) The bill alleged the ditches were lengthened and extended which was admitted by defendants in error, except Hiatt, as hereinbefore mentioned, he neither denying or affirming.

(b) The undisputed testimony is that the ditch was lengthened or extended. (R. 37 and 63.) The only disputed matter if it may so be called was whether Hiatt had claimed or received warrants for the lengthening or extension. On his cross examination, however, he admitted it (R. 66) and an estimate was given him for the

work (R. 66) and on that he received a warrant (R. 67) and it is further shown by Exhibit P. (R. 36) and the cost was included in the assessment (R. 36 and 67).

(c) The opinion of the Supreme Court of Iowa both admits and denies our claim, i. e.:

"There is also evidence of some original excavation at the outlet." (R. p. 89.)

"It further appears that the contractor extended the excavation beyond the district limits a short distance * * *." (R. p. 89.)

"The charge in the plaintiff's petition and repeated in argument that the work contracted for and done included a lengthening or extension of the ditch or ditches beyond their original dimensions is not justified by the record." (R. p. 89.)

VI.

The enlargement of a ditch already constructed, either by widening, deepening, or extending it, would, for all practical purposes, constitute a new ditch, depending perhaps upon the extent of the enlargement.

In re Renville County, 109 Minn. 88, 122 N. W. 1120, 1121.

VII.

A deepening of one foot for a part of a ditch's length beyond the original depth has been held a *material deepening*, so as to require notice and hearing of assessments to be levied for the cost.

In re Renville County, 114 Minn. 281, 130 N. W. 1103.

VIII.

There is a distinction between repairing a ditch, by removing obstructions therefrom, and widening or deepening or extending it.

In re Renville County, 109 Minn. 88, 122 N. W. 1120, p. 1121;
Harbough vs. Martin, 30 Mich. 234;
Lanning v. Palmer, 117 Mich. 529, 76 N. W. 2;
Taylor v. Crawford, 72 Ohio St. 560, 74 N. E. 1065, 69 L. R. A. 805;
Fries v. Brier, 111 Ind. 65, 11 N. E. 958;
Romack v. Hobbs, (Ind.) 32 N. E. 307;
Weaver v. Templin, 113 Ind. 298, 14 N. E. 600;
People ex rel. Munsterman v. McDougal, 205 Ill. 636, 69 N. E. 95;
Denyer v. Shonert, 1 Ohio C. C. 73;
Taylor v. Brown, 127 Ind. 293, 26 N. E. 822.

IX.

The Supreme Court of Iowa has repeatedly held that land within a drainage district can be assessed for improvements made therein only for the actual (not theoretical) benefits accruing to the particular tracts of land within the district.

Jenison v. Greene County, 145 Iowa, 215, 123 N. W. 979;
In re: Johnson Drainage District, 141 Iowa, 380, 118 N. W. 380;
Rystad v. Drainage District, 157 Iowa, 85, 137 N. W. 1030;
Theilen v. Board, 179 Iowa, 248, 160 N. W. 915.

X.

The Supreme Court of Iowa has consistently held that in passing on the equality of the assessment, the depth of the improvement as affording outlet to lands, should be taken into consideration, and where a ditch has been cleaned out or deepened, consideration should be given to the adequacy of the original ditch prior to the cleaning out or the deepening, as furnishing an outlet for lands in making assessments therefor.

Harriman v. Board, 169 Iowa 324, 151 N. W. 468;
Monson v. Board of Supervisors, 167 Iowa, 473, 149 N. W. 624;
Theilen v. Board, Supra;
Pollock v. Story County, 157 Iowa, 232;
Obe v. Board of Supervisors, 169 Iowa, 449;
Bibler v. Board, 162 Iowa, 1;
O'Donnell vs. Board, 184 Iowa, 1360, 169 N. W. 660.

XI.

The levying of a special assessment imposing a burden upon lands without a compensating advantage is not due process of law.

Myles Salt Company v. Board of Commissioners, 239 U. S. 478; 60 Lawyer's Ed. 392;
Gast Realty & I. Company v. Schneider Granite Company, 240 U. S. 55; 60 Lawyers' Ed. 523;
Fallbrook Irrigation District v. Ridley, 104 U. S., 112; 41 Lawyers' Ed. 369;
Norwood v. Baker, 172 U. S. 269, 43 Lawyers' Ed. 443.

XII.

Where the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted

Federal rights has any support in the evidence, it is this Court's duty to review, and to correct where there is error.

Postal Tel. Cable Co. v. Newport, 247 U. S. 464, 62 L. ed. 1215, 38 Sup. Ct. Rep. 566;
Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. ed. 662, 669, 33 Sup. Ct. Rep. 277;
North Carolina R. Co. v. Zachary, 232 U. S. 248, 259, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305;
Carlson v. Washington, 234 U. S. 103, 106, 58 L. ed. 1237, 1238, 34 Sup. Ct. Rep. 717;
Norfolk & W. R. Co. v. West Virginia, 236 U. S. 605, 610, 59 L. ed. 745, 748, 35 Sup. Ct. Rep. 437;
Interstate Amusement Co. v. Albert, 239 U. S. 560, 567, 60 L. ed. 439, 443, 36 Sup. Ct. Rep. 168;
Ward v. Love County, 64 L. ed. U. S. Advance Opinions, 492 issue of June 1, 1920.

XIII.

If non-Federal grounds, plainly untenable, may be put forward successfully, this Court's power to review might easily be avoided.

Ward v. Love County, Supra;
Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 Sup. Ct. Rep. 767.

XIV.

A state Court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a federal right, any more than it could do so by making findings that were wholly without support in the evidence. And this court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is also its duty in the absence of adequate findings to examine the evidence in order to determine what facts might reasonably be found therefrom, and which would furnish a basis for the asserted federal right.

Carlson v. Washington, Supra.

XV.

Where a state court expressly holds that a statute gives a Board of Supervisors the authority to enlarge, reopen, deepen, widen, and straighten ditches within a drainage district and to assess the cost thereof upon the lands therein, without notice and without an opportunity for hearing by the interested land owners, the statute deprives the landowners of

their property without due process of law, contrary to the 14th Amendment to the Constitution of the United States, and the statute should be held invalid by this court and the assessments levied void.

See authorities under points III, IV and V.

1. As the Iowa Supreme Court held:

> "The contract between the Board and Hiatt to which the plaintiffs object, appears to be fairly and clearly within the scope of the power and responsibility conferred by this section. Even if the terms of the contract be as broad and comprehensive as plaintiffs say they are, they are still not in excess of the authority expressly given to "enlarge, reopen, deepen, widen and straighten" the completed ditches for the purpose of keeping them in repair and maintaining them in efficient working order. The statute imposes no duty to give notice in advance of each separate work of repair, or to advertise the same for competitive bids—except, perhaps, as may be implied in the proviso at the end of the section which seems to recognize such necessity where additional right of way is to be taken and this reservation is sufficient, in our judgment, to obviate any possible objection on constitutional grounds."

It would seem that under the facts as stated by the Supreme Court of Iowa that this Court must necessarily hold that Sec. 1989-a-21 of the statutes of Iowa does not provide for due process and is therefore void, as the constitutional validity of a statute is to be tested, not by what has been done under it, but by what may by its authority be done.

Stuart v. Palmer, 74 N. Y. 183, p. 188.

ARGUMENT.

In general, where deprivation of liberty or property is involved, the essentials of due process of law upon both sides of the Atlantic are notice and hearing. *Painter v. Liverpool Gas Co.*, 3 Ad. & El. 433; *Stuart v. Palmer*, 74 N. Y. 183; *In re Renville County, (State v. Maguire)*, 109 Minn. 88, 122 N. W. 1120; *Londoner v. Denver*, 210, U. S. 373.

One familiar exception to this is found in those cases where the immediate exigencies of police protection sanction summary deprivation of property without any hearing whatsoever. *N. A. Cold Storage Co. v. Chicago*, 211 U. S. 306.

But it is well settled that the mere fact that administrative officials are invested with powers involving deprivation of property in their exercise, does not justify such deprivation upon mere official fiat, without hearing. *Stuart v. Palmer, Supra; Londoner v. Denver, Supra; In re: Renville County,*

Supra; Turner v. Wade, L. ed. Advance Opinions October 1920 term, issue of December 1, 1920, page 23.

In *Central of Georgia v. Wright,* 207 U. S. 127, 52 L. ed. 134, this Court said:

> "Former adjudications in this Court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require." *Davidson v. New Orleans,* 96, U. S. 97; 24 L. ed. 616; *Weyerhaueser v. Minn.,* 176 U. S. 550; 44 L. ed 583; Supra Ct. Rep. 485; *Hagar v. Reclamation Dist. 108,* 111 U. S. 701; 28 L. ed. 569, 4 Supra Ct. Rep. 663.
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> "In the late case of *Security Trust & S. V. v. Lexington,* 203 U. S. 323, 51 L. ed. 204, 27 S. Ct. Rep. 87, decided at the last term of this court, the subject underwent consideration, and it was there held that, before an assessment of taxes could be made upon omitted property, notice to the tax payer, with an opportunity to be heard, was essential, and that somewhere during the process of the asesssment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace."

In *Turner v. Wade,* reported in 65 L. ed. Advance Opinions of December 1st, 1920, page 23, this court had before it the constitutional validity under the due process clause of the 14th Amendment of a certain provision of the Georgia Tax Equalization Act. The Georgia statutes provided that the Board of Assessors were to meet at a time stated to assess the tax returns and if the valuation was unfair to make a fair valuation of the property and upon change being made that notice should be given the taxpayer and if dissatisfied he might demand an arbitration, the tax payer to select one arbitrator, the Board another and the two, a third; the decision of the two arbitrators being binding. In this case arbitration was had, but each of the three arbitrators placed a different valuation on the property; and it was further provided by the statute that if the arbitrators did not render decision within ten days from the naming of the arbitrator by the Board of Assessors the decision of the board of assessors should stand and be binding in the premises. In the course of its opinion in that case, this Court said:

> "In considering certain sections of the Georgia tax laws, this Court held in *Central of Georgia R. Co. v. Wright,* 207 U. S. 127, 52 L. ed. 134, 28 S. Ct. Rep. 47, 12 Annotated cases 463, that due process of law requires that

after such notice as may be appropriate, the tax payer have opportunity to be heard as to the validity of the tax and the amount thereof by giving him the right to appear for that purpose at some stage of the proceedings. This case, with others, was cited with approval in *Londoner v. Denver*, 210 U. S. 373, 385, 52 L. ed. 1103, 1112, 28 Sup. Ct. Rep. 708 wherein we said that if the legislature of the state, instead of fixing the tax itself, commits to the subordinate body the duty of determining whether, and in what amount and upon whom, the tax shall be levied, due process of law requires that at some stage of the proceedings, before the tax becomes irrevocably fixed, the tax payer must have the opportunity to be heard, of which he must have notice whether personal, by publication, or by some statute fixing the time and place of the hearing. See 210 U. S. 385, and previous cases in this Court cited on page 386. See also *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 425, 59 L. ed. 1027, 1032, 35 Sup. Ct. Rep. 625. * * *

"In the present case, as the facts already stated show, the tax payer is subject to assessment made without notice and hearing. In that situation we are clear that the case comes within the decision of this Court, in *Central Georgia R. Company v. Wright, Supra*, and kindred cases, and not within that line of cases where statute has fixed the time and place of hearing, with opportunity to the tax payer to appear and be heard upon the extent and validity of the assessment against him."

It is of course well settled law that some requirements which are essential in strictly judicial proceedings, are not always requisite in tax proceedings. But a requisite which is essential in both judicial and tax proceedings is notice and hearing. In *Londoner v. Denver* 210 U. S. 373, 385, this court said:

"Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings for taxation. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal." *Pittsburg, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 426, 38 L. ed. 1031, 1036, 14 Sup. Ct. Rep. 1114. *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 171 *et seq.*, 41 L. ed. 369, 393, 17 Sup. Ct. Rep. 56.

In the instant case the Iowa legislature (as the statute is construed by the Supreme Court of Iowa) attempted to confer upon the Board of Supervisors, it being the governing

body of all drainage districts within the County, an authority to *repair* and to materially alter a previously constructed ditch, either by enlarging, reopening deepening, widening, straightening or lengthening, and to assess the cost to lands within the district without notice to or opportunity to be heard by interested property owners. That the statute offends against the due process clause of the Federal constitution appears clear on authority. It is to be remembered, of course, that the constitutional validity of the law is to be tested, not by what has been done under the statute, but by what may by its authority be done. (*Stuart v. Palmer*, 74 N. Y. 183 p. 188.)

The Minnesota Court in *re Renville County*, 109 Minn. 88, 122 Northwestern Reporter 1120, 1121, distinctly holds that a Statute giving a right to enlarge a previously constructed ditch by widening its banks or deepening its channel without notice violates the constitutional provision as to due process of law. The Court said:

> "The objection to the validity of the statute is that it makes no provision for notice to interested parties or otherwise affords them an opportunity to be heard upon questions affecting the propriety and necessity of the improvement authorized to be made under the statute, and is therefore unconstitutional and void as depriving those against whom assessments are made of their property without due process of law. The statute, a part of the drainage act of 1905, provides that after the construction of any ditch the board of county commissioners of the proper county shall keep the same in repair and free from obstructions, and authorizes the widening or deepening thereof, if in the judgment of the board necessary to answer the purpose of its construction. It further provides that the costs and expense of such improvements shall be paid from the general revenue fund of the county, reimbursing that fund by special asesssments upon benefited property. As urged by counsel for appellant, the statute contains no provision for notice to interested parties, or from an appeal from the action of the board, or any other method or opportunity by which the landowners may be heard at any stage of the proceedings. In short, the proceedings under this section are wholly ex parte.
>
> "We are of the opinion that the Statute, in so far as it attempts to clothe the board of commissioners with ex parte power and authority to enlarge, by widening or deepening, a ditch theretofore constructed, is unconstitutional and void by reason of its failure to provide some kind of notice to those who are required by the statute to defray the expense of the improvement, or afford

them an opportunity at some stage of the proceedings to be heard upon all questions necessary to be determined in order to justify the proposed work. It is clear that the original proceeding could not be authorized by the Legislature without some provision for notice or opportunity to be heard upon these questions. (28 Cyc. 979; Hamilton on Special Assessments, 141); and it is equally clear that the enlargement of a ditch already constructed, either by widening or deepening it, would, for all practical purposes, constitute a new ditch, depending, perhaps, upon the extent of the enlargement. There is a distinction between repairing a ditch, by removing obstructions therefrom, and widening or deepening it. *Harbough v. Martin*, 30 Mich. 234; *Lanning v. Palmer*, 117 Mich. 529, 76 N. W. 2; *Taylor v. Crawford*, 72 Ohio St. 560, 74 N. E. 1065, 69 L. R. A. 805, and cases cited in note. In some of the States it has been held that even in the case of ordinary repairs, notice and opportunity to the landowner to be heard at some point in the proceedings is essential to the validity of a statute authorizing the same (*Campbell v. Dwiggins*, 83 Ind. 473) though the authorities on the point are not in harmony. But we find no conflict upon the proposition that authority to enlarge a ditch, either by widening its banks or deepening its channel, must be upon notice of some kind. *Fries v. Brier*, 111 Ind. 65, 11 N. E. 958; *Weaver v. Templin*, 113 Ind. 299, 14 N. E. 600; *Dauyer v. Shonert*, 1 Ohio Cir. Ct. Rp. 73; *Owensburg v. Brocking*, (Ky.) 87 S. W. 1086; *Romack v. Hobbes*, (Ind.) 32 N. E. 307.

"If the statute under consideration authorized ordinary repairs only, such as removing obstructions and accumulations of foreign substances in the ditch, we would follow the rule of the Iowa court and some of the other states to the effect that provision for notice to the owners of adjoining property is not essential to the validity of the statute. *Yeomans v. Riddle*, 84 Iowa 147, 50 N. W. 886. We practically so held in the case of *McMillan v. County Com'rs*, 93 Minn. 16, 100 N. W. 384, where section 25, c. 258, p. 427, Laws 1901, was construed and upheld, though the precise point does not seem to have been raised. The cost and expense of ordinary repairs, the removal of rubbish and obstructions, if properly made from year to year, would be inconsiderable, and no serious burden to property owners, and a requirement of notice and other proceedings essential to an original undertaking would be impractical, render the work of the board unnecessarily cumbersome, and serve no substantial purpose. And, as suggested, if this statute were so limited, notice would be held unnecessary. But it is not so limited. On the contrary, the statute not only authorizes

repairs, but grants to the board the further power to enlarge the ditch by widening its banks or deepening its channel."

This case was re-affirmed on a second appeal and upon a showing that the ditch was deepened one foot, part of its length, the assessment was held to be unconstitutional. *In re Renville County,* 114 Minn. 281, 130 N. W. Rep. 1103.

Until the decision by the Supreme Court of Iowa in the instant case, that court had held that in such a case as the present, notice and hearing to the taxpayer was a prerequisite. *Lade v. Board of Supervisors,* 183 Iowa 1026, 166 N. W. 586. However, it should be said that the Supreme Court of Iowa in the *Lade* case held that the statute here involved had been superseded by another statute (Sec. 1989-a-11) it being claimed that the Statute, Sec. 1989-a-11 was a later statutory enactment, and that statute expressly provided for notice and hearing. In the instant case, the Court held that the statute in controversy here being 1989-a-21 had not been superseded by Sec. 1989-a-11.

In the *Lade* case the court speaking through Justice Salinger said:

> "While it is true the board of supervisors has authority to have an existing ditch widened and deepened, and to make assessment for the costs thereof, this may be done only if notice be given and none was given. See Code Supplement, Sec. 1989-a-11, as amended by Section 10, Chapter 118, 33 G. A., and Section 4 of Chapter 87, 34 G. A., which was the law at the time involved in this controversy; Section 1989-a-21 having been superseded by said Section 1989-a-11. So it does not matter that the work actually done might have been authorized, or that it was of benefit to these plaintiffs, and the sole question at this point is whether that for which it is sought to charge these plaintiffs was in fact no more than repairing and cleaning. If it was not repairing and cleaning, but widening and deepening, the cancellation of the assessment in review was justified."

This is further emphasized in the following statement:

> "An assessment having been made wholly on the ground that cleaning and repairing was to be paid by it, such assessment must be cancelled if in general substance the work done was not cleaning and repairing, and was of a character for which notice was not given as by law required."

And, again in that case, it is said:

> "The plaintiffs knew that widening and deepening could not lawfully be engaged in at their cost, unless they had been served with notice and knew they had not been so served."

It would seem clear enough that the "repair", or "reopening", is a restoration of the improvement to its original condition. An enlargement of any sort, whether widening or deepening or lengthening, it seems to us, cannot be legitimately considered a "repair".

That the Court may have before it the statute Sec. 1989-a-11 referred to in the *Lade* opinion, we set it out in the margin below. (1)

In the present cause the plaintiffs in error (plaintiffs below) in presenting their cause to the Supreme Court of Iowa cited and relied on *Lade v. Board, Supra.* It is conceded in the record that no notice was ever given the plaintiffs in error; that they were not given an opportunity to object to the work to be done and that they were not given the opportunity to contest the validity or the amount of the assessment for the work done. In the instant case, the Supreme Court of Iowa

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(1). Sec. 1989-a-11. Changes in dimensions—notice —objections—appeal.

"If after the establishment of said district, and before the completion of the drainage improvements therein it shall become apparent that a levee or drain should be enlarged, deepened or otherwise changed or that a change or alteration in the location should be made for the better service thereof, said board may by resolution authorize such change or changes in the said improvement as the engineer shall recommend; provided that, whenever any change or changes are made either under this section or under any other section of this chapter, all persons whose land shall be taken or whose assessments shall be increased thereby shall first have been given like notice as provided in section nineteen hundred eighty-nine-a three of this chapter, and shall have like opportunity to file claims for damages, as provided for in section nineteen hundred eighty-nine-a four of this chapter, or file objection to such assessment as provided in section nineteen hundred eighty-nine-a twelve of this chapter, as the case may be, and like opportunity to appeal from the action of the board as provided in section nineteen hundred eighty-nine-a six of this chapter, or section nineteen hundred eighty-nine-a fourteen of this chapter, as the case may be."

found that there was a deepening and a widening in certain places and that

> "the channels were not only reopened, cleaned and emptied of silt and obstructions but were in part to some extent materially deepened."

The following language, taken from the opinion of the Supreme Court of Iowa, would appear to concede, what cannot be disputed, that the work, for which the assessments were imposed, was not a mere work of repair—not the removal of obstructions from the original ditch—but was for the work of an enlarged ditch, and that a substantial part of the assessment sought to be enjoined is imposed for the purpose of raising money to pay for enlarging the original ditch, by both *deepening* and *widening* it:

> "Under the direction of the engineer, or in pursuance of the plans furnished by him, the contractor also in certain places, *increased the depth of the excavation* below its original grade and in other places sought to insure greater permanency of the banks of the ditch by *increasing their slope* and to that extent *increased the original width* of the channel. There is also evidence of some *original excavation at the outlet.*"

It is true that a little later on the Court says:

> "The change in the plaintiff's petition, and repeated in argument, that the work contracted for and done, included a lengthening or extension of the ditch or ditches, beyond their original dimension, is not justified by the record, but as we have said it is to be conceded that the channels were not only reopened, cleaned and emptied of silt and obstructions, but were in part, to some extent, materially deepened."

The statement of the court above quoted to the effect that the record does not justify the claim that the ditch was lengthened and extended is surely an inadvertence on the part of the Court. For the record does in fact show the claim was fully sustained, and even the opinion of the court shows it. We quote from the opinion (R. 89, lines 14 to 17):

> "There is also evidence of some original excavation at the outlet.
>
> "It further appears that the contractor extended an excavation beyond the district limits a short distance in order to facilitate the successful operation of the drainage system."

Furthermore, the record shows the following:

(Testimony of Hiatt, the contractor) "I couldn't say just the time I dug this outlet in Calhoun County. I did the work during the time the work was done between Station 0 and 115. I was given an estimate of 11,000 yards of excavation from station 0 to 115. Station 0 began at the extreme end of the ditch as originally built. *If anything was added to the estimate from 0 to 115, it would necessarily include that beyond 0, or the new ditch. I know,* that I got an estimate that covered more than between stations 0 and 115. Any work I did below Station 0 was not recleaning, but reconstruction work. I personally received those identical estimates marked Exhibit "P" from Warrington (the engineer) and filed them as evidence on which I was entitled to warrants. When I got the warrants from the Auditor I got them because of presenting these estimates. I had no right to be paid for work outside the county. I dug that outlet *below* Station 0 about *two feet deep, twenty feet wide, two hundred fifty feet long.*

It is thus apparent that the Court was in error in one portion of the opinion in stating that there was no extension, as it does concede later in the opinion that there was an extension. But where it makes this concession, the Court again falls into error in stating that the contractor neither asked nor received compensation. We quote the opinion:

"There is also evidence of some original excavation at the outlet. It further appears that the contractor extended an excavation beyond the district limits a short distance in order to facilitate the successful operation of the drainage system, but for this work he testifies he neither asked nor received compensation and his statement does not appear to be disputed."

It is true that in direct examination Mr. Hiatt stated he made no claim for and had received no compensation for the work of the extension. But in cross examination, as hereinbefore set out he admits he got the estimates, and that the work was included on estimate "P" and that he got a warrant therefor. (Estimate P. is shown at pages 36-37 R.)

Inasmuch as the statements in the Opinion are somewhat hesitantly made, in so far as stating fully the enlargement of the ditch, we wish to call attention to the record upon this point. That there may be no question in the mind of the Court as to what the facts were we set out below the facts, and facts which are undisputed in the record.

The ditches were materially deepened, widened and lengthened.

S. F. Moeller, an engineer who had cross-sectioned the ditch, and whose testimony is not disputed, said (R. p. 59):

> "If the ditch had been excavated to the original dimensions it would have required the removal of some 709 cu. yds. That would replace the ditch the same dimensions for which Hiatt was originally paid for construction. I have further examined Mr. Warrington's field notes in reference to this branch A for the purpose of ascertaining what difference, if any, there was, in the bottom width of the Branch as reconstructed by Hiatt and the bottom width as shown in the original estimate or field notes upon which the original estimate was based. I examined the ditch as it exists for top and bottom width in April, 1915. I found the top and bottom width both are wider than originally planned. I find the average top width 20.2 feet from my survey. The average top width of the estimate originally from Mr. Warrington's notes is 15.4 feet. As found on my survey the bottom width average 8.4 feet. * * *
>
> Q. Do you know the original bottom width shown by Warrington's original estimate?
>
> A. Original plans are four foot bottom.
>
> Q. And you found the bottom actually, on your survey, to have average width of 8.4 feet?
>
> A. Yes, sir."

The Court will please note that, by actual measurements of an engineer, the average top width of the ditch was increased from 15.4 feet to 20.2 feet, that is twenty-five (25) per cent. The bottom width from 4.8 feet to 8.4 feet, obviously a very material increase.

The Court will also notice the reference to 709 cubic yards in the evidence quoted. This is the amount of yardage the removal of which would have been required to restore the ditch to the original dimensions. As we shall know a little later, the assessment upon this portion of the ditch (Branch A) includes the cost of removing—not merely 709 cubic yards, but of 3599 cubic yards. Thus the enlargement of this particular ditch, of the system of ditches, took out more than five times the amount of yardage that would have been required to restore the ditch to its original dimensions. Every yard beyond the 709 yards took new right of way. The original ditch was of the dimensions of the original plan, and no more. The establishment of this improvement gave the right to construct, and keep in repair, a ditch of a certain dimension. The right of way was obtained by "establishing" the original plan and design of a ditch; that right of way had its bound-

aries exactly co-extensive with the boundaries of the improvement thus designed when so established. If there is a right to go beyond those boundaries and take out an additional 2800 or 2900 cubic yards upon this Branch A, 2300 feet long, what objection is there to taking out twice, or ten times, that amount? The enlargement is certainly a material enlargement. The few thousand square feet, which will thus be taken out of the control of the adjoining proprietors and belong to the District because it represents right of way, are quite as valuable as any other few thousand square feet of the property of the riparian proprietor, and once it is established that the constitution does not safeguard a taking, if in the opinion of the Board, or of the Court, the taking is in moderation, although a material and substantial invasion, then, of course, from that time on the constitutional safeguards may as well be abolished. They no longer afford any protection. Likewise, if notice is not required where additional right of way is taken, that is to say, where the ditch is enlarged and substantially changed, because it seems to the Board, or to the Court, that the case is not a very extreme one and that the taking has been, for example, only a matter of a few acres, leaving the greater part of the land to its proprietor, then there is no reason for stopping short of a position that ignores the constitution altogether and declares that property may be taken without notice and hearing including "taking" by way of special assessments.

There is no doubt of the enlargement. We have referred especially to Branch A because the facts are brought out so clearly in respect of that particular line of ditch that there is no use in gainsaying the record. But in principle the entire contract was in the same case.

The evidence of the drainage engineer that we quoted is the result of actual measurements. Carter, who actually had charge for the contractor of the work, said (R. p. 23):

> "Between these two points at the outlet I made from the outlet to the north side of the Milwaukee track with team and scraper and from there on up as far as we went I sloped the west side with team and scraper. Mr. Hiatt was working there then over on the other side cleaning out. I cleaned the west side and he the east side.
>
> Q. Describe as best you can how much you enlarged that ditch?
>
> A. Why we made it about three feet deeper and fully five and one-half feet wider at the bottom with a slope—Oh, we must have sloped it one and one-half to the foot. Sam cleaned out the bottom and I sloped on the west side with team and scraper. I went down the side of the ditch about three feet. This continued throughout the length from the Chicago, Milwaukee and St. Paul track north, as far as we went on Branch A.

Q. I want to know whether you dug the ditch deeper than originally constructed?
A. Yes, sir.
Q. How much deeper?
A. About three feet."

We wish to impress upon the Court the fact that this evidence is not disputed. The defendant in error, Hiatt, does not really deny the evidence to which we have referred. True, he estimates the "probable" enlargement as somewhat less than the engineer measured it, or than Carter, who did the work, says it was done. He said, (R. p. 64):

"Branch A was made wider probably two feet on top. A foot or six inches on the bottom. The original bottom width when first constructed I thought was four feet. It was made probably one and one-half feet wider and the second time probably one and one-half feet at the bottom. * * * The members of the Board who gave us instructions were Mr. Dooley. He told us to take out what would fill in. Mr. Dooley visited the ditch frequently. Gave me instructions. Followed these instructions as nearly as I could. Lieb visited the work; gave us instructions. Followed those instructions. Warrington visited the ditch. Gave us instructions and I followed those instructions.

Q. Now after you had followed the instructions of Lieb, Dooley and Warrington, Branch A for example, you then left as you finished that branch, a certain sized ditch a certain cross section?

A. Yes, sir.

I cannot tell you how many yards I took out of Branch A. I don't know as I ascertained the number of yardage I was entitled to in Branch A.

Q. You do not really claim now that you are entitled to any more money for the excavation on A than the original contract called for?

A. No.

Q. You do know if you get the balance of these warrants you are now claiming you will be paid for some 3599 cubic yards on Branch A?

A. Believe that is it.

Q. You are now claiming to get 28 cents a yard for 3599 cubic yards in Branch A?

A. Yes, sir.

Q. And want it in this suit?

A. Yes.

Q. And expect these plaintiffs and other taxpayers to pay you for this yardage?

A. Yes, sir."

Your Honors will notice that, notwithstanding he estimates the "probable" enlargement as less than the measurement showed it to be, that he admits that he is claiming, and there is involved in this assessment which plaintiffs seek to enjoin, charge for 3599 cubic yards of earth that he took out of Branch A. We have already called attention to the fact that 709 cubic yards would have made it as big as it originally was. Warrington planned it larger than the original. That is, he planned to have 936 cubic yards taken out of Branch A, and the contract, which was signed, called for that (R. p. 69):

> "In addition to the above mentioned work in the lower end of said district, second party agrees to clean, reopen and repair Branch "A" of said district from Sta. Zero to Sta. 23 as specified in the engineer's report approximating about 836 cubic yards in said Branch "A", the same to be done as part of the lower end of said district, and to clean, reopen, deepen and repair said drainage improvement from Sta. 402 to Sta. 500 as specified in said engineer's report and approximating about 7317 cubic yards, and herein called the upper end of said district, agreeing to clean, reopen, and deepen said improvement according as the same is specified by said engineer's report."

Your Honors will notice the contract was not for a mere repair, but for an enlargement.

The following quotation from the contractor's own testimony and admissions calls attention to the fact that it was admittedly dug wider and dug deeper. (R. p. 65, 19th l. on p. 66):

> "I figured that the work in Branch A would be what Warrington told me and what the report showed and what the contract showed. I did not know what Warrington's plans were in June, 1911, for excavation of Branch A. Never found out. I did not consult my contract to see what yardage I would have to dig out of Branch A. I don't remember just what the contract does say in regard to A.
>
> Q. Will you refresh your recollection from the Contract Exhibit "X" and state if the yardage you were to take out of Branch A was 936 yards?
>
> A. Yes, I remember seeing that in the contract.
>
> Q. But you are now claiming for just one yard less than 3600 yards; practically four times the amount con-

templated taking out when the contract was made, are you not?

A. Yes, sir.

Q. So at the time you made contract there was about 936 yards necessary to be taken out in order to put it in original shape?

A. Yes, sir.

Q. What happened after you made that contract between that time and the time you dug the ditch to make it necessary to dig four times as much yardage out of the ditch to put it in the condition it was in originally?

A. Conditions of the soil.

Q. What were they?

A. The ditch was, as I said before, filled up but it was a soft marshy soil and in order to make the ditch stand that it had to be dug wider and we dug it deeper, so if it filled any we would still retain our grade. This additional size I gave to Branch A was the sole solicitation of Mr. Dooley. He was the only one that had me do anything extra. He was on the job very frequently. We had nicely got started and he came and said we were leaving the ditch too straight. Wanted the banks sloped. I thought he was right, the banks needed sloping, so we sloped them. I really trusted my own judgment in making this aditional excavation regardless of Warrington's instructions. I felt that I should do all in my power to make a good ditch. I figured I would naturally be paid for what I did and figured to make as good a ditch as possible. When I first dug Branch A I dug an average depth of three feet. The bottom was originally planned to be four. The side banks had a slope of one and one-half to one."

As clearly as any matter could be established the enlargement is shown by the facts to have included (1) Deepening (2) Widening (3) Lengthening of the old ditches in the district.

Statements in the opinion of the Supreme Court of Iowa in the instant case suggest that that court regards a *material* enlargement, at least by *deepening*, of a drain is not necessarily a factor of consequence in the apportionment of the tax, and on that theory that the right of due process is not infringed. We think that it may easily be demonstrated that this is a wholly erroneous view. It often occurs that a ditch, efficient in serving most of the property within the drainage district, is inadequate for thorough or effective drainage in respect of one or more bodies of relatively lower land because not sufficient depth can be obtained for the drain tile for first

class results and an adequate fall or grade obtained to a connection with the public drain. Section 1989-a-12 (Set out below) requires that

"the lands receiving the greatest benefit shall be marked on a scale of one hundred, and those benefited

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Sec. 1989-a-12. Assessment of costs and damages—apportionment. When the levee or drainage district or other improvement herein provided for shall have been located and established as provided for in this act, or when it shall be necessary to cause the same to be repaired, enlarged, reopened or cleared from any obstruction therein, unless such repairs, reopening or clearing of obstructions can be paid for as hereinafter provided, the board shall appoint three commissioners, one of whom shall be a competent civil engineer and two of whom shall be resident freeholders of the state not living within the levee or drainage district and not interested therein or in a like question, nor related to any party whose land is affected thereby; and they shall within twenty days after such appointment begin to personally inspect and classify all the lands benefited by the location and construction of such levee or drainage district, or the repairing or reopening of the same, in tracts of forty acres or less according to the legal or recognized subdivisions in a graduated scale of benefits, to be numbered according to the benefit to be received by the proposed improvement; and they shall make an equitable apportionment of the costs, expenses, costs of construction, fees and damages assessed for the construction of any such improvement or the repairing or reopening of the same and make report thereof in writing to the board of supervisors. In making the said estimate the lands receiving the greatest benefit shall be marked on a scale of one hundred and those benefited in a less degree shall be marked with such percentage of one hundred as the benefit received bears in proportion thereto. This classification when finally established shall remain as a basis for all future assessments connected with the objects of said levee or drainage district, unless the board, for good cause, shall authorize a revision thereof. * * * If the first asessment made by the board of supervisors for the *original cost or for repairs* of any improvement as provided in this act *is insufficient*, the board may make an additional assessment and levy in the same ratio as the first for either purpose.

in a less degree shall be marked with such percentage of one hundred as the benefit received bears in proportion thereto."

And the provision found in the same section that the classification "shall remain as a basis for all future assessments" is significantly qualified by the words: "Connected with the objects of said levee or drainage district." The apportionment of the costs and expenses is to be made in the ratio of benefits. Of course, it needs no elaboration to prove that a material change in the depth of the ditch may, and almost inevitably does, alter the relative benefits to the various tracts of land and their owners. An increase of one to three feet in the depth of the ditch often does, and in this case certainly did, benefit in an extraordinary degree certain tracts of land because adequate drainage was then afforded, whereas the original improvement did not afford adequate drainage. The following statement from the evidence of one of the engineers suggests, at least, an analogous proposition:

"Well, we will assume now, that a ditch is dug, no laterals constructed, assessments for main ditch are spread, some of the outlying lands might be assessed on an equitable basis, ten, twenty, thirty or forty dollars to the forty, and receive all the assessments due according to the benefits. Then take the same district, and construct laterals up through some of the side lines, and they might be benefited ten thousand dollars, to the extent of ten or twelve hundred dollars to the 40, sometimes more, and then their assessment on one forty, instead of fifty, might be ten hundred and fifty dollars. We clean out the ditch. If the lateral had not been assessed, we would prorate it, and his share of the clean out might be twenty dollars or forty per cent, possibly $50, whereas if you include the cost of the lateral in which the cost of the main, and assess on that to raise the cost of repairing, he might pay, say 20% of his ten hundred and fifty dollars, or two or three hundred dollars, whatever it is. He certainly is not benefited more by cleaning out than by the main, and by this you would assess this outlying forty and are doing it in this case, sometimes three or four hundred times the original ditch." (R. 52-53.)

The Iowa Court in *Christenson vs. the Board*, 179 Iowa, 745, 748-9, in discussing a similar situation, said:

"If the commissioners in this case had followed the directions of the statute, and had fixed the amount of benefit accruing to each landowner in the Bear Creek district by reason of the deepening and extending of the outlet, they might have found that the benefits of such

extension were not in the same ratio, as among the landowners, as the original benefits which accrued in the establishment of the district. The facts of this case are quite illustrative of the possibilities of such a situation. About five-sevenths of the original cost of the improvement of Section 1 of the Bear Creek District was assessed against the plaintiff Braland. His lands, however, are farthest removed from the outlet. The original outlet was located upon the land of Mortvedt. This land was low. Mortvedt received damages for the location of such outlet upon his land. His benefits, also, were regarded as comparatively small because of the low elevation and location of his land. The outlet being now extended and deepened by the new enterprise, the commissioners might have found that the benefits of such extension and deepening of the outlet were comparatively greater to Mortvedt than they were to Braland."

In this particular case, it is obvious that such a line as Branch A would but inadequately serve property owners who required an outlet through that Branch as the Branch was originally constructed. But, with the relatively enormous changes which were made under the Hiatt contract in the enlargement of the drain, doubtless the property owners will be well served. The original assessment apportioning the benefits in accordance with the "actual" benefits, must be presumed to have resulted in a low assessment upon the land served by this ditch. But, as a result of the enlargement of the drain, which of course, in this case, was both widened and deepened (but would be the same if it had been deepened only), a property owner who may have had actual benefits of only—say one hundred dollars per forty acres, may easily have benefits of one thousand dollars, or more.

We venture to say, if the point needed proof, that it could be demonstrated in this district, and in every other large district, that it could be found that in the original assessment, the owner of a given forty acre tract has been assessed, upon the theory that adequate drainage would be given him, a large sum, say one thousand dollars. Another owner of a like amount has been assessed only one-tenth of that sum because only an inadequate outlet was given. Suppose thereupon the ratio being thus fixed the Board decides to deepen the inferior outlet, after which both tracts will be served alike. Not only will the second tracts of property and the owner escape paying a relatively equitable proportion of the original tax, but the property which has been assessed for full benefits in the first instance will actually pay ten times as much for enlarging the ditch to give equally adequate service to the other tract.

The property that is finally served when the ditch is enlarged could not have been taxed in the first instance because it was subject only to assessment for actual not theoretical benefits. The apportionment should be according to the benefits actually, and not theoretically derived.

The system for ascertaining the benefits, which fixed the benefits as measured by actual conditions, can no longer be regarded as an equitable apportionment, when, for the original set of actual conditions, there is substituted another set affecting in a wholly different way the several tracts of land in the district.

The Supreme Court of Iowa has repeatedly held that land within a drainage district can be assessed for improvements made therein only for the actual (not theoretical) benefits accruing to the particular tracts of land within the district. *Jenison v. Green County*, 145 Iowa, 215, page 220, 123 N. W. 979; *In re: Johnson Drainage District*, 141 Iowa, 380, 118 N. W. 380; *Rystad v. Drainage District*, 157 Iowa, 85, 137 N. W. 1030; *Theilen v. Board*, 179 Iowa, 248, 160 N. W. 915.

Furthermore the Court has consistently held that in passing on the equality of the assessments the depth of the improvement, as affording an outlet to lands, should be taken into consideration, and where a ditch has been cleaned out or deepened consideration should be given to the adequacy of the original ditch prior to the cleaning out or the deepening as furnishing an outlet for lands in making assessments therefor. *Harriman vs. Board*, 169 Iowa, 324, 151 N. W. 468; *Monson v. Board of Supervisors*, 167 Iowa, 473, 149 N. W. 624; *Theilan v. Board of Supervisors*, 179 Iowa, 248, 160 N. W. 345; *Pollock v. Story County*, 157 Iowa, 232, 138 N. W. 415; *Obe v. Board of Supervisors*, 169 Iowa, 449, 151 N. W. 453.

It will be observed from the record in this case that the assessment which was originally levied against the lands within the drainage district was the result of an apportionment according to the benefits which it was determined would accrue to the several parcels of land in the construction of the original improvements.

The Supreme Court of Iowa furthermore has consistently said that in levying an assessment on the lands within a drainage district the Board should consider the previous outlet and previous means of drainage enjoyed by the lands within the district. *Rystad v. Drainage District*, 157 Iowa, 85, 137 N. W. 1030; *Lyon v. Sac County*, 155 Iowa, 367, 136 N. W. 324; *Obe v. Board*, 169 Iowa, 449, 151 N. W. 453; *Harriman v. Board*, 169 Iowa, 324, 151 N. W. 468; *Bibler v. Board*, 162 Iowa, 1, 142 N. W. 1017; *O'Donnell v. Board*, 169 Iowa, 660, 169 N. W. 660.

It is of course self-evident that a drain cannot be deepened without relatively changing the value and usefulness of the drain in respect of different tracts of land in the area served by the improvement. This is true both of the land lying

along the ditch and directly served thereby, and all tracts of land lying farther back. Throughout the portions of the State in which drainage districts have been constructed, while ample fall is afforded for many of the parcels of land in a district, other have barely enough fall to get the surface waters off. Such are relatively lower lying tracts. A material change in the depth of the channel will make an enormous difference in the benefits to the lower lying tracts. (R. page 52.) *Christenson v. Board*, 179 Iowa, 745, 748-749.

As will be observed by a reading of the Iowa drainage statute, Section 1989-a1 to 1989-a27, inclusive, the thought of the act is throughout that the original assessment shall have relation to "the original design or plan of the ditch as therein established."

This thought is found throughout the Act and has been recognized by the decisions of the Supreme Court of Iowa. It must, therefore, be fundamental that an assessment based upon such original design or plan cannot be regarded as a just and equitable assessment when there is substituted for the original plan or design a different plan or design.

The statute, Section 1989-a12, specifically requires the commissioners appointed by the Board of Supervisors to make an equitable apportionment of the cost, and that in making the estimate that "the lands receiving the greatest benefit shall be marked on a scale of one hundred and those benefited in less degree shall be marked in such percentage of one hundred as the benefit received bears in proportion thereto." That the commissioners on the original assessment for the original construction canot take into account the benefits which might result from a subsequently reconstructed, or enlarged, widened or deepened improvement, is apparent from the statute and from the decisions of the Supreme Court of Iowa. Furthermore, under the mandatory provisions of the law the commissioners in making the assessment can take into account simply and solely the improvement as shown by the approved engineer's plans, and not a different improvement which may be constructed in the future. (*C. & N. W. Ry. Co. v. Board of Supervisors*, 172 N. W. 443 (Iowa); *Kelley v. Drainage Dist.*, 158 Ia. 735, p. 743.)

As appears from the record, (transcript pages 42 and 56), the costs of the new construction of which complaint has been made herein, was assessed against the various tracts of land within the drainage district in the same ratio as the lands were assessed for the construction of the original improvement therein.

There was included in the drainage district, and subject to assessment for the costs of construction, more than two hundred and fifty forty acre tracts. Hence, the drainage area served by the improvement contained more than ten thousand acres. (R. pp. 74-80.)

The improvement constructed to serve this drainage district consisted of three principal lines of open drain. In parts of the district there were certain lateral lines of tile or closed drains. The closed drains cost much more to construct but are more permanent in their character, requiring little or no expense for cleaning or repairing. Lands having such closed drains crossing the same bear a much greater burden of assessments than lands served only by open drains.

The main open ditch serving this district was about twelve miles long; two branches of open drain connected therewith, and had their outlet in the lower part of the main ditch. (R. p. 61.) Branch "A" was the designation of one of the open branches, the other was Branch "B". (R. 41; R. 47.) These branches served widely separated tracts of land and except that the branches had a common outlet, the tracts of land contiguous to the respective branches had nothing in common. Bodies of land varying in area from several hundred acres to several thousand acres, were served respectively by the main line of ditches known as the "main" or by "Branch A or Branch B". The gradient of the several lines of open ditch varied much as did also the natural contour of the surface of the areas which were served.

When the original assessment was spread upon the lands in the district the benefits were calculated in accordance with the drainage afforded by the improvement as originally planned and constructed. And the total cost of the entire improvement, including the three lines of open drain, was apportioned over the whole district without subdivision into units served by the respective lines of drain. (R. pp. 52-53.)

The contract for the "enlargement", "repairing" and "deepening" which was the basis for the assessment in controversy here, provided for additional excavation work in the "main" ditch and in branch "A" (R. 69), so that lands served alone by branch "B" could not receive any actual benefits. At least it will be considered that for the work done on branch "A" this must be true. The respective engineers testifying for the plaintiffs in error, and for the defendant, agreed that the result of widening and deepening certain lines of drain in a system of this kind thus bettering the improvement serving only a part of the district and spreading the assessment in accordance with the original assessment, was unfair to the property owner whose property was not served by the reconstructed drains. (See R. 52-53; pp. 72-73.) The engineer for the defendants referring to the original assessment and apportionment in accordance with which the present assessment was spread (R. p. 72) said:

> "In this particular case the final assessment was made by what was called the Skeels commission. The Skeels commission lumped the costs and damages for the entire

district in one lump sum and spread it over the entire ditch as one unit, without reference to and served by various laterals. I recall from my investigation that the cost of Branch B itself is a considerable sum in proportion to the area served by it.

Q. Now, if the property owners in that area had been assessed a sum in proportion to the rest of the district as one lump sum and are assessed now in accordance with the original assessment in proportion to that for the cost and cleanout, they may get excessive assessments, in proportion to the benefits from the cleanout itself, and so may the property owners in every special drainage area served by an expensive tile. Is that correct?

A. If they had originally paid in proportion to the cost of their tile line and now paid on a basis of the original assessment, which was practical for a tile line, they would of course pay for the cleanout in proportion to the cost of their tile line, and the main together. And if their tile line were more expensive, would make the cleanout tax heavier."

These plaintiffs paid large assessments originally, due to the considerable benefits attributed in the original assessment to the lines of tile crossing their farms. The result as testified to by one of the engineers, was that for the cost of deepening a remote line of open drain which in no way served their property, they were now being assessed as much as three or four hundred times what owners of other remote tracts were being assessed. (R. pp. 52-53.) This was due to the fact that the forty acre tracts served by the tile drains originally constructed, were assessed upon the basis of the direct benefits resulting from such permanent drains, and lands served by open drains such as the property contiguous to Branch A was assessed a relatively insignificant sum for such forty acre tract. Now, that branch A is enlarged and deepened to give adequate drainage to the land contiguous thereto, the cost of deepening and widening the drain in order to give such adequate service is made to rest, not upon the contiguous and benefited lands, although if the assessment was an original one this would be true. Notwithstanding the fact that the total cost of such improved drain inured to the exclusive benefit of the lands contiguous thereto, almost the whole burden of producing such benefits is by reason of this inequitable law thrown upon the land not benefited at all.

When, therefore, the Board of Supervisors ordered a levy to be "spread on the tax lists" in the same ratio as the original assessments "were made and confirmed" (R. 42), *the effect was to order the assessment to be spread in the inverse ratio to the benefits.* The benefits accruing from the deepened

and enlarged drains that now took the place of the shallow and inadequate drains necessarily were proportionately greater in respect of the lands contiguous to the improved drain than land remote therefrom. And of course, remote lands served entirely by other lines of drain were really not benefited at all as a result of the deepening and enlarging of such originally inadequate drains. Thus, assessments which originally were only nominal because of the inadequacy of the drains serving the tracts contiguous thereto, continued only nominal in amount, although adequate drainage was now afforded for such tracts of land. And assessments which originally were very large because of the benefits, accruing from lines of drainage in no manner enlarged or repaired or bettered, continued large in amount although the taxes were levied solely to pay the costs of the drainage of lands remote from the lands thus bearing the greater burden of the costs.

The lands of the property owners who are here concerned as plaintiffs in error were served by Branch B. (R. 31-34; R. 45.)

In apportioning the original assessment the taxing authorities, acting under the Iowa statute, took into account, the extent to which a land owner has drained his lands, the character and location of the lands, and their elevation as compared with other lands in the drainage area; the adequacy of the outlet afforded by the improvement involving the relative elevations of the surface of the land and the bottom of the ditch, together with the distance of the tract to be drained, from the improvement, and the amount of fall required for efficient drainage. Therefore, if an improvement as originally planned and constructed affords only inadequate drainage for contiguous lands, the assessment of benefits is necessarily so apportioned that only small or nominal amounts are originally thus assessed against the tracts not adequately served. And when the drain is enlarged or deepened in order to give adequate drainage for contiguous tracts which before were inadequately served, it must necessarily follow that the original ratio of assessment based upon a status that no longer exists can no longer govern if equity is to prevail.

Under Section 1989-a12 it is the imperative duty of the assessing authorities to spread the original assessment in accordance with the benefits directly accruing from the construction of the improvement as originally planned. It was the duty of the authorities in this case to apportion the cost of the original construction so as to burden lightly the lands served by Branch A as originally constructed. Hence, when branch A was deepened and widened and the cost thereof spread in accordance with the benefit from the original construction the result was to impose upon the property owner served by distant lines of drain suchas the property owners in the area served by branch B, in addition to the full assess-

ments for the cost of their own drains, the greater part of the cost of reconstructing branch A from which their lands derive no benefits.

Section 1989-a21 as construed and enforced by the Iowa Supreme Court denying the right to notice and hearing in respect of the apportionment of the cost of the reconstructed improvement, is in direct violation of the safeguards provided in the Federal constitution.

The facts in this case are not unusual and well illustrate the vice in the statute as construed and enforced by the Supreme Court of Iowa. Here are two or more parallel lines of drain extending from a common outlet miles through extensive areas of agricultural lands. These several substantially parallel lines are constructed as a single "improvement" and assessments are spread for the total cost of all the lines as originally constructed in proportion to the benefits accruing to the several forty acre tracts of land in the drainage area. As originally planned, certain areas of lands are so low in elevation with respect to the bottom of the particular drains affording an outlet for the surface drainage therefrom, that a relatively small assessment is necessarily imposed under the statute for the benefits to such tracts. Some years thereafter, it is decided to repair and enlarge by deepening and widening the inadequate drain, and as a result thereof sufficient and adequate drainage is afforded for the tracts of land originally assessed only small or nominal amounts. Under Section 1989-a21, without notice or any opportunity for hearing, an assessment is spread upon tracts of land many miles distant from the enlarged drain for the cost of enlarging it, and which lands are benefited not at all by such enlargement. Because the original scheme of drainage afforded an adequate outlet for these distant lands (and in this case because expensive lines of tile were originally placed across such land and the cost charged to the lands) the original assessment thereon was many times as great as the assessment against the tracts contiguous to the originally inadequate drain. Hence, the reassessment, without notice or hearing, results in compelling such land originally adequately drained to pay practically all of the costs of the original adequate drain and later on, practically all of the cost of affording adequate drainage to the lands which were not originally well drained.

The statute in question compels an inequitable assessment to be made without notice or hearing in every case where the enlarged or bettered improvement is so enlarged or bettered as not to benefit in the same proportion all tracts of land subject to assessment in the district. It is perfectly obvious that enlargment by deepening, widening or otherwise, of certain lines of drains in an extensive improvement district without adding anything whatsoever to other such lines of drains, must inevitably lead to gross inequalities in the assessment

of the costs of reconstruction. If the new assessment must be spread in the same ratio as original assessments and no opportunity afforded to show that although the original assessment was equitable the cost of enlarging certain of the branches cannot be equitably spread in accordance therewith, the necessary effect of so enforcing the statute is to impose the burden upon the tracts of land originally assessed for the first improvement without any compensating advantage. This is a clear violation of the due process clause of the Federal constitution.

This Court has held repeatedly that imposing a burden without a compensating advantage, is not due process of law. *Myles Salt Company v. Board of Commissioners*, 239 U. S. 478, 60 L. ed. 392, was a case in which a tax was levied by the commissioners of a drainage district upon the plaintiff's lands. It was there shown that the plaintiff's lands were so situated that they could not directly or indirectly receive any benefit, other than such benefit as might accrue to it incidentally by the benefit which accrued to other lands within the drainage district. It was claimed that the tax so levied was without due process of law and this claim was sustained by this Court. In the course of its opinion this Court said:

> "It is to be remembered that a drainage district has a special purpose of the improvement of particular property, and when it is so formed to include property which is not and cannot be benefited directly or indirecly including it, only that it may pay for the benefit of other property, there is an abuse of power and an act of confiscation."

In *Gast Realty & I. Company v. Schneider Granite Company*, 240 U. S. 55, 60 L. ed. 523, a special assessment was levied which was not at all based upon the benefits covered, and this Court held that it violated the due process clause of the federal constitution, and on the writ of error reversed the State Court. In that case this Court said:

> "But as is implied by *Houck v. Little River Drainage District*, if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of the one so taxed in fact. *Martin v. District of Columbia*, 205 U. S. 135, 139, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440."

In *Fallbrook Irrigation District v. Bradley*, 104 U. S. 112, 41 L. ed. 369 at page 394, this Court said:

"The right which he (the landowner) thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, i. e. the amount of the tax which he is to pay. *Paulson v. Portland*, 149 U. S. 30, page 41, 37 L. ed. 641. But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (Board of Supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the Board be against their being benefited. Unless the legislature decides the question of benefits itself, the landowner has a right to be heard upon that question before his property can be taken. This, in substance was determined by the decision of this Court." *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, and *Spencer v. Merchant*, 125 U. S. 345, 356, 31 L. ed. 763, 767."

In *Norwood vs. Baker*, 172 U. S. 269, 43 L. ed. 443, this Court said:

"In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him, is to the extent of such excess a taking under the guise of taxation of private property for public use without compensation."

Furthermore in the course of that opinion this Court said:

"While abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property furnished, substantial excess of such exercise of special benefits will, to the extent of such excess, be a taking of private property for public use without compensation. * * * The judgment of the Circuit Court must be affirmed upon the ground that the assessment against plaintiff's abutting property was under a rule, which excluded any inquiry as to special benefits, and the necessary operation of which, was, to the extent of the excess of costs of opening the street in question of any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation."

The Supreme Court of Iowa in the instant case, says:

> "But by the other section, 1989-a21, provision is made for the maintenance and care of the drainage system after the 'district shall have been established and the improvement constructed.' For that purpose it is there provided that the improvement 'shall at all times be under the control and supervision of the board of supervisors and it shall be the duty of the board to keep the same in repair' and for that purpose 'they may cause the same to be enlarged, reopened, deepened, widened, straightened, or lengthened for a better outlet.' The cost of such repairs and changes are to be paid from the drainage fund of the district or by assessing it upon the lands in the same proportion that the cost of the original construction was assessed—except where additional right of way is taken and in such case the board must proceed as the statute provides for establishing an original improvement."

It is apparent from the opinion of the Supreme Court of Iowa that in its judgment the requirements of due process are fulfilled without any reference to the making of the assessment provided no new right of way is taken. In other words, it appears to be the Court's view that if it were essential to condemn an entirely new right of way, that then it would be necessary that there be notice and hearing to the landowner whose lands were required to be taken for the new right of way, and even here, the Court evidently so holds simply because the statute expressly requires notice and hearing. The Court, however, seems to be of the opinion that a widening and deepening of a ditch which is in itself, of course, a taking of additional right of way, does not require notice or hearing to the landowner; and further it takes the position that the constitutional requirements of due process do not apply in levying a tax for the expense of deepening and widening even though no benefits accrue to the landowner whose lands are assessed therefor. We submit that the constitutional requirements have as much application to notice and hearing in levying special assessments as they have to notice before exercising the power of eminent domain.

There seems to be no dispute among the authorities with the exception of the holding by the Iowa Supreme Court in the instant case, that in order to come within the provisions of a statute authorizing and controlling the repair of ditches, and taxation of benefited property in payment therefor without notice and hearing, the proceedings must be limited to a mere restoration of the ditch to the condition in which the original construction proceedings left it. Repair proceedings cannot be employed to complete work which has been left in-

complete, nor to enlarge work which was inadequate as originally constructed.

The Minnesota Court (reference to which has been hitherto made in the argument) holds that by enlargement of a ditch already constructed, whether by widening or deepening it, does for all practical purposes constitute a new ditch. (*In re Renville County*, 122 N. W. 1120, 1121.) The same Court in 130 N. W. 1103, being a second appeal of the case just mentioned, held that a deepening of one foot for a part of the ditch's length beyond the original depth, was a material deepening so as to require notice and hearing of assessments to be levied for its costs.

It is to be remembered that there is a vital distinction between repairing a ditch by removing obstructions therefrom, and widening, deepening or extending it. *In re Renville County*, 122 N. W. 1120, 1121 (Minn.); *Harbough v. Martin*, 30 Mich. 234; *Lanning v. Palmer*, 117 Mich. 529, 76 N. W. 2; *Taylor v. Crawford*, 72 Ohio St. 560, 74 N. E. 1065; 69 L. R. A. 805; *Fries v. Brier*, 111 Ind. 65, 11 N. E. 958; *Romack v. Hobbs*, (Ind.) 32 N. E. 307; *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600; *People ex rel. Munsterman v. McDougal*, 205 Ill. 636, 69 N. E. 95; *Denyer v. Shonert*, 1 Ohio C. C. 73; *Taylor v. Brown*, 127 Ind. 293, 26 N. E. 822.

The Illinois Court in *People v. Munsterman*, 69 Northeastern 95, 96-7, said:

> "At the regular meeting, November 1, 1902, the commissioners made a levy of $25,000 for the purpose of deepening and cleaning out the ditches of this district. 'It is thus apparent that the commissioners, in making this levy, attached to the terms "cleaning" and "repairing" a much wider significance than can be given the term "repair" under section 70 above cited, and it is also apparent that the commissioners were without authority to make this levy, under that section, for the purpose for which it was made, except such portion of the levy, if any, as was necessary' to keep the work, or any part thereof, in repair for the year next ensuing.
>
> "Appellant cites the case of *Ottawa Glass Company v. McCaleg*, 81 Ill. 556, in support of the proposition that 'the commissioners, acting within the scope of their authority are the judges as to whether or not the tax in question is a repair tax, and their judgment in the matter is not subject to review.' If this statement of the law were correct it would relieve the courts of the burden of determining whether the tax was a valid one. We find on examination, however, that the authority cited does not warrant the conclusion which counsel for appellant have drawn therefrom.

"The statement of the drainage commissioners in their certificates that the tax levied is a tax for repairs is not conclusive, and where it is shown that it is not a tax for that purpose it cannot be sustained as a repair tax under said section 70."

A levy cannot be made on a subdistrict for the purpose of cleaning out or improving branches of the main district constructed by the whole district. See *People v. Wilder*, 100 N. E. 932. If this is true, is not the converse not true that an assessment cannot be made upon the property owners in one subdistrict to pay for the expense of enlarging the main ditch which is of no benefit to the property owners in the subdistrict?

One of the latest pronouncements on the questions at issue in this case is that of the Supreme Court of Indiana in *Harmon v. Bolley*, (Ind.) 120 N. E. 33. The matter is discussed in an exceedingly able opinion by Justice Lairy of that Court. We quote from the opinion:

"Appellees filed their petition in the Miami circuit court asking for the cleaning and repair of a public ditch located in the counties of Miami and Wabash and known as the 'Squirrel Creek Ditch'. The proceeding was had under a statute of this state specially providing for proceedings for the repair of public ditches constructed by means of a steam shovel or floating dredge. * * * The petition was by the court referred to the county surveyor of Miami county, with directions to make an examination of the ditch proposed to be cleaned, and to report to the court as provided by the first section cited. The surveyor filed a written report in favor of the proposed cleanout, with complete specifications for repairs, whereupon notice by publication for two weeks was given by the clerk of the court. * * * On the return day fixed in the notice appellants appeared and filed verified objections to the jurisdiction of the court on the ground that the statute hereinbefore cited, which purports to confer jurisdiction on the court to order the repair of ditches in the manner therein provided, is void for the reason that its provisions with reference to the manner in which assessments are to be made conflict with certain provisions of the state and federal Constitutions. * * * The statute under consideration provides for a hearing on the report after notice, on which the court shall determine whether such ditch shall be repaired, and, in case the finding is in favor of such report the courts shall determine the order and manner in which said ditch shall be cleaned; and after such order has been made the clerk shall let the contract, after giving the notice provided, to the lowest

responsible bidder, which contract shall be approved by the Court. The costs of such repairs, including the per-diem of the county surveyor and printer's fees for the publication of all necessary notices, shall be paid by the persons, corporations, corporate roads, and railroads who are the owners of lands or rights of way originally assessed for the cost of construction of said ditch, in proportion to their original assessments as levied and made for the construction of said ditch. * * * It is made the duty of the clerk of the court in which such proceedings is had to make a computation of the several assessments to be made and levied for such repair work by distributing the total cost of construction and the other expenses incidental thereto as in this act provided, and to prepare a report of the same, giving the name of the landowner assessed as the same appears on the tax duplicate, a description of his lands, and the amount to be apportioned to said lands, whereupon such report shall be submitted to the court for approval. If the Court finds the report to be correct, it shall approve the assessments as made and fix the time within which the same shall be paid. Under the provisions of the act, all assessments paid to the clerk within the time fixed by the court shall be turned over to the county treasurer for the purpose for which the same were intended, and it is made the further duty of the clerk to certify all assessments not paid within such time to the county auditor, to be placed on the tax duplicate, and collected with a penalty of 10 per cent, as other taxes are collected. * * * Appellants' position is that the provisions of the act with reference to the allotment of the costs and expenses of the repairs is in conflict with the provisions of the Fourteenth Amendment to the federal constitution. * * * It is the theory of appellants that the statute under which the proceedings were had provides for the apportionment and assessment of the costs and expenses of the repair to the several tracts and parcels of land affected in an arbitrary manner, without regard to the real or actual benefits which will accrue to each parcel of land by virtue of the proposed improvement, and that no provision is made by the statute whereby appellants are entitled to a notice or hearing by which the actual benefits to their lands may be determined by any tribunal. If the statute is followed, it is apparent that an assessment will be placed against the lands of appellants which will bear the same ratio to the total costs and expenses of the proposed repairs as the original assessments against said lands bore to the total assessments made for the construction of the ditch originally, and that no provision is made whereby they can challenge the amount of the assessment so made as being in excess of

the actual benefits accruing to their lands on account of such repair. * * * Such rules of apportionment are always fixed according to some ratio, and, where no provision is made for a judicial inquiry as to actual benefits, they are invariable and unchangeable. If the result to be reached is the fixing of assessments in accordance with actual benefits, and if such rules are well adapted to reach that end, they afford due process of law and should be universally upheld. * * * On the other hand, if such rules are not well adapted to reach that end; if their application, at best, results in assessments which are to some degree disproportioned to actual benefits, and some times work a gross injustice; if a judicial determination, after notice and the hearing of evidence, is more likely to result in fixing assessments in accordance with actual benefits; if that course is better adapted to protect the rights of the citizen and is more suitable to the administration of justice according to the forms of law usually recognized and adopted in the settlement of such questions—then due process of law requires that a judicial determination after notice and hearing should be provided for. *Hager v. Reclamation Dist., supra; Davidson v. New Orleans,* 96 U. S. 97, 24 L. ed. 616. * * * The law under consideration provides that the entire costs of the repairs of ditches to which it applies shall be imposed on the lands assessed for its construction. Under this rule lands which were not assessed for the original construction of the ditch, but which find outlet through it by means of connecting drains subsequently constructed, could not be assessed to pay any part of the cost of repair, although they might be largely benefited thereby. It appears from the objections filed that a large part of the fill which makes the repairs necessary is located on certain lands through which the ditch runs, and that such fill was caused by the stock of the owners of those lands in tramping the adjacent soil into the ditch and thus destroying the banks. It is stated that the removal of the fill thus caused will constitute a large part of the cost of the proposed repair. Some of the objectors state that the drainage from their lands finds an outlet into the ditch at a point below the portion so filled, and that the fill to be removed was not caused by sediment washed in by their drainage, and that its removal will not afford them any better outlet for their drainage than they now have. Under the rule of apportionment adopted by the law, these facts could not be considered in fixing the assessments. * * * The objectors allege that in making the assessments for the construction of the ditch the viewers, in obedience to the statute, made deductions from the estimated benefits to numerous tracts of land affected on ac-

count of existing private drains which were utilized, and that the assessment against lands, as shown by the record of that proceeding, represents the actual benefits less such deductions. It thus appears that the original assessments against such tracts of land were not in accordance with the actual benefits received from the construction of the ditch, and that an apportionment of the cost of repairing such ditch to the several tracts of land originally assessed in proportion to such original assessment would not result in fair and just assessments in accordance with the benefits. Such rule of apportionment is unreasonable and unjust as applied to the facts shown, but the law is not void for that reason. It is void because it does not afford due process of law for the protection of the rights of the landowner by providing for a notice and hearing on the question of actual benefits, whereby the assessments could be adjusted to accord with actual benefits accruing to each tract of land affected. For the reasons stated, any assessment levied under the provisions of the statute under consideration would be void, and the enforced payment of any money on account of such assessments would constitute a deprivation of the property of a citizen by the state without due process of law, within the meaning of the Fourteenth Amendment of the federal Constitution."

In the foregoing case, as appears from the decisions, the statutes of Indiana provides that for repairs had the landowners within the district are to be assessed for the cost of repairs "in proportion to their original assessment as levied and made for the construction of said ditch." This language is identical in substance with the language of Iowa Code Section 1989-a21. The Indiana Court holds that such an assessment is not due process. Furthermore, the statutes of Indiana provide that where it is sought to clean out or repair an established ditch, that notice for publication shall be given for two weeks that a hearing will be had thereon; and in the foregoing case the landowners appeared on the written date fixed in the notice and filed their objections. The Iowa statute as construed by the Supreme Court of Iowa does not even afford a hearing to the interested landowner as to whether or not repairs should be had.

In the instant case, we have called attention to the fact that the undisputed facts in this case show that there was a material deepening, widening and lengthening of the old ditch as originally constructed. The Supreme Court of Iowa, does, by its opinion, find that there was a material deepening; and further finds that there was a widening, and both affirms and denies in its opinion that there was an extension. We take it to be the well established rule of this Court that it will

review the facts. This Court has held in numerous cases that where the question arises as to whether the basis of fact upon which the State Court rested its decision denying the asserted federal rights has any support in the evidence, that it is this Court's duty to review and correct where there is error. *Postal Tel. Cable Co. v. Newport*, 247 U. S. 464, 62 L. ed. 1215, 38 Sup. Ct. Rep. 566; *Southern P. Co. v. Schuyler*, 227 U. S. 601, 611, 57 L. ed. 662, 669, 33 Sup. Ct. Rep. 277; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 259, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305; *Carlson v. Washington*, 234 U. S. 103, 106, 58 L. ed. 1237, 1238, 34 Sup. Ct. Rep. 717; *Norfolk & W. R. Co. v. West Virginia*, 236 U. S. 605, 610, 59 L. ed. 745, 748, 35 Sup. Ct. Rep. 437; *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 567, 60 L. ed. 439, 443, 36 Sup. Ct. Rep. 168; *Ward v. Love County*, 64 L. ed. U. S. Advance Opinions, 492 issue of June 1, 1920.

If this were not true and if non-federal grounds, plainly untenable, might be put forth by a State Court successfully, then this Court's power to review might easily be avoided. *Ward v. Love County, supra; Terre Haute & I. R. Co. v. Indiana*, 194 U. S. 579, 589, 48 L. ed. 1124, 1129, 24 Sup. Ct. Rep. 767.

As this Court put the matter specifically in *Carlson v. Washington, supra:*

> "A state Court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a federal right, any more than it could do so by making findings that were wholly without support in the evidence. And this Court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is also its duty in the absence of adequate findings to examine the evidence in order to determine what facts might reasonably be found there from, and which would furnish a basis for the asserted federal right."

In the instant case the Supreme Court of Iowa expressly holds that the statute (1989-a21) gives the Board of Supervisors of a County the authority to enlarge, reopen, deepen, widen and straighten ditches within a drainage district, and to assess the cost thereof upon the lands therein without notice, and without an opportunity for hearing by the interested landowners, and notwithstanding this holding the Supreme Court of Iowa held that it did not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States. That it does violate this clause seems clear under the authorities. (See authorities under brief points 3, 4 and 5.)

The position taken by the Supreme Court of Iowa in the instant case may be seen from the following quotation:

> "The contract between the Board and Hiatt to which the plaintiffs object, appears to be fairly and clearly within the scope of the power and responsibility conferred by this section. Even if the terms of the contract be as broad and comprehensive as plaintiffs say they are, they are still not in excess of the authority expressly given to 'enlarge, reopen, deepen, widen and straighten' the completed ditches for the purpose of keeping them in repair and maintaining them in efficient working order. The statute imposes no duty to give notice in advance of each separate work of repair, or to advertise the same for competitive bids—except, perhaps, as may be implied in the proviso at the end of the section which seems to recognize such necessity where additional right of way is to be taken and this reservation is sufficient, in our judgment, to obviate any possible objection on constitutional grounds."

In view of the foregoing statement by the Supreme Court of Iowa, it appears to us that this Court must necessarily hold that Section 1989-a21 of the Statute of Iowa, does not afford due process and is therefore void, inasmuch as the constitutional validity of a statute is to be tested, not by what has been done under it, but by what may by its authority be done. (*Stuart vs. Palmer*, 74 N. Y. 183, 188.)

In the quotation from the opinion of the Supreme Court of Iowa, to which we have just referred and set out above, that the Court plants itself squarely on the proposition that inasmuch as the legislature has authorized, that a previously constructed drain in a drainage district may be enlarged, reopened, deepened, widened and straightened, that full effect must be given to such legislation; otherwise that the Court will "judicially neutralize the plainly expressed will of the legislature."

And it further holds that as thus construed by it, the act in question does not deny due process of law.

Surely the position thus taken by the Supreme Court of Iowa cannot be upheld by this Court.

We respectfully ask that the judgment of the Supreme Court of Iowa may be reversed.

Respectfully submitted,

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